No. 89-1647-CFX
Status: GRANTED

Title: Carnival Cruise Lines, Inc., Petitioner
v.
Eulala Shute, et vir

Docketed:
April 24, 1990

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Willard,Richard K.

Counsel for respondent: Wall,Gregory J.

Entry	Date	Note	Proceedings and Orders
1	Apr 24 1990	G	Petition for writ of certiorari filed.
2	May 23 1990	G	Motion of International Committee of Passenger Lines for leave to file a brief as amicus curiae filed.
3	Jun 5 1990		DISTRIBUTED. June 21, 1990
4	Jun 8 1990	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
5	Jun 15 1990	F	Response requested -- TM.
6	Jul 16 1990		Brief of respondents Eulala Shute, et vir. in opposition filed.
7	Jul 18 1990		REDISTRIBUTED. September 24, 1990
8	Oct 1 1990		Motion of International Committee of Passenger Lines for leave to file a brief as amicus curiae GRANTED.
9	Oct 1 1990		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
10	Oct 1 1990		Petition GRANTED.
			**********
12	Nov 13 1990		Joint appendix filed.
13	Nov 13 1990		Brief of petitioner Carnival Cruise Lines, Inc. filed.
11	Nov 15 1990		Brief amicus curiae of International Committee of Passenger Lines filed.
14	Nov 15 1990		Brief amicus curiae of Chamber of Commerce of the United States filed.
15	Nov 23 1990		SET FOR ARGUMENT JANUARY 15, 1991. (4TH CASE)
16	Nov 28 1990		CIRCULATED.
17	Dec 17 1990	X	Brief of respondents Eulala Shute, et vir. filed.
18	Jan 7 1991	X	Reply brief of petitioner Carnival Cruise Lines, Inc. filed.
19	Jan 15 1991		ARGUED.
20	Jan 15 1991		Record filed.
		*	Certified copy of C. A. Proceedings received.

89-1647
No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a long-arm statute constitutionally reach a defendant whose activities in the forum state are insubstantial and bear only a tenuous relationship to the cause of action?

2. Is a forum selection clause in a steamship passenger ticket enforceable?

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OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, dated February 22, 1990, is to be reported at 897 F.2d 377 and is reproduced at pages 1a-24a of the Appendix to this Petition. The original opinion of the court of appeals, dated December 12, 1988, is reported at 863 F.2d 1437 and reproduced at Pet. App. 25a-48a. The order of the court of appeals withdrawing the original opinion and certifying a question to the Supreme Court of Washington is reported at 872 F.2d 930 and reproduced at Pet. App. 49a. The opinion of the Washington Supreme Court on the certified question is reported at 113 Wash. 2d 763 and 783 P.2d 78 and reproduced at Pet. App. 50a-59a. The order and judgment of the United States District Court for the Western District of Washington, dated June 25, 1987, are not reported and are reproduced at Pet. App. 60a-65a.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1990. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves: the due process clauses of the Fifth and Fourteenth Amendments; two provisions of the Limited Liability Act, 46 U.S.C. §§ 183b & 183c; 28 U.S.C. §§ 1404(a) & 1406(a); Rule 4 of the Federal Rules of Civil Procedure; and the Washington long-arm statute, Wash. Rev. Code Ann. § 4.28.185. These materials are reprinted at Pet. App. 66a-71a.

STATEMENT OF THE CASE

This case is an action against a nonresident corporation for personal injuries occurring on a cruise in international waters, based upon the admiralty and maritime jurisdiction of the federal courts, 28 US.C. § 1333.

Respondents Eulala and Russel Shute filed this suit to recover damages for injuries occurring when Mrs. Shute slipped and fell during a seven-day cruise on the M/V TROPICALE from Los Angeles to Puerto Vallarta, Mexico. Pet. App. 2a-3a. The fall occurred in international waters off the coast of Mexico, while Mrs. Shute was on a guided tour of the ship's galley. *Id.* Respondents are residents of Washington State. Pet. App. 2a.

The TROPICALE is operated by Petitioner Carnival Cruise Lines, Inc., a Panamanian corporation with its principal place of business in Miami, Florida. Pet. App. 2a. The courts below found, based on undisputed facts, that Carnival does not have property or offices in Washington or operate ships that call at Washington ports. Its sole activities in the state were found to consist of buying advertisements for its cruises in local newspapers

and encouraging local travel agents to sell its cruises by distributing brochures, holding seminars, and paying a 10 percent commission. *Id.* In 1985 and 1986, Carnival's revenues from residents of Washington were 1.29 and 1.06 percent, respectively, of its total revenues. Pet. App. 7a.

Carnival issued the tickets in Florida upon receipt of payment from respondents' local travel agency and sent the tickets to respondents in Washington. Pet. App. 2a. The tickets contained the terms of the passage contract, including the following forum selection clause:

> It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.

Pet. App. 3a.

Respondents filed this suit in the United States District Court for the Western District of Washington and served Carnival with a summons pursuant to the Washington long-arm statute, Wash. Rev. Code Ann. § 4.28.185, as provided by Rule 4(e) of the Federal Rules of Civil Procedure. Pet. App. 4a-5a. Carnival moved for summary judgment dismissing the case for lack of personal jurisdiction or on the basis of the forum selection clause. Carnival alternatively sought transfer to the United States District Court for the Southern District of Florida. Pet. App. 3a.

The Honorable Carolyn R. Dimmick, United States District Judge for the Western District of Washington, granted Carnival's motion for summary judgment and dismissed the case for lack of personal jurisdiction. Pet. App. 60a-65a. The district court held that Carnival did not have sufficient contacts with the forum state to support the exercise of long-arm jurisdiction consistent with

the due process clause of the Fourteenth Amendment. Pet. App. 64a. The district court did not consider the effect of the forum selection clause in the ticket passage contract. Pet. App. 60a.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed in an opinion authored by the Honorable Betty B. Fletcher and joined by Circuit Judges Robert Boochever and Stephen S. Trott.[1] Pet. App. 25a-48a. The court of appeals agreed with the district court that Carnival's activities relating to the forum state were not sufficient to support the exercise of general *in personam* jurisdiction. Pet. App. 30a-31a. However, the court of appeals held that respondent's claim "arose out of" Carnival's advertising and promotional activities directed at the forum state and was thus subject to the exercise of "specific" *in personam* jurisdiction. Pet. App. 31a-44a.

After Carnival filed a timely petition for rehearing with suggestion for rehearing *en banc*, the court of appeals withdrew its opinion and certified to the Washington Supreme Court the question of whether the Washington long-arm statute conferred personal jurisdiction over Carnival for the claim in this case.[2] Pet. App. 49a. The Supreme Court of Washington held that the state long-arm statute extended as far as permitted by the due process clause and, relying upon the withdrawn opinion of the court of appeals, held that assertion of personal jurisdiction in the present case would not violate due process. Pet. App. 58a-59a.

The court of appeals subsequently issued an amended opinion, reaching the same conclusions as its original

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[1] Appellate jurisdiction was based on 28 U.S.C. § 1291.

[2] This question was apparently certified because a recent decision by an intermediate appellate court in Washington had held there was no long-arm jurisdiction on similar facts. *Banton v. Opryland U.S.A., Inc.*, 53 Wash. App. 409, 767 P.2d 584 (1989). *See* Pet. App. 51a-52a.

opinion. Pet. App. 1a-24a. Petitioner has never been informed of any action by the court of appeals on its suggestion for rehearing en banc, but this petition for certiorari is being filed as required by the last sentence of Rule 13.4 of the rules of this Court.[3]

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATES AS TO WHEN A CAUSE OF ACTION ARISES OUT OF OR RELATES TO ACTIVITIES IN THE FORUM STATE FOR THE PURPOSE OF ASSERTING "SPECIFIC" *IN PERSONAM* JURISDICTION.

This case presents the question of what kind of relationship is necessary between a plaintiff's cause of action and a defendant's contacts with the forum state in order to support the assertion of "specific" *in personam* jurisdiction consistent with the Due Process Clause of the Fourteenth Amendment. The Court explicitly identified this issue but declined to decide it in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984). *Compare id.* at 424-28 (Brennan, J., dissenting).

This is an issue that frequently arises and has been resolved in conflicting ways by the state courts and lower federal courts. It has provoked a lively debate among legal scholars. It is ripe for resolution by this Court, and the present case presents a good context for deciding it.

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[3] As required by Rule 29.4(c), petitioner notes that this petition draws into question the constitutionality of a Washington statute, that 28 U.S.C. § 2403(b) may therefore be applicable, and that the court below did not certify to the state attorney general that the constitutionality of a state statute was drawn into question.

There is no parent company or subsidiary (other than wholly-owned subsidiaries) to be listed pursuant to Rule 29.1.

A. The Due Process Clause of the Fourteenth Amendment Requires Certain Minimum Contracts to Support Long-Arm Jurisdiction.

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny, this Court has held that the Due Process Clause of the Fourteenth Amendment imposes significant limits on the ability of states to employ long-arm statutes to assert jurisdiction over nonresident defendants. The defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (citations omitted).[4]

When the cause of action does not arise out of or relate to the defendant's activities in the forum state, those activities must be sufficiently "continuous and systematic" to make the assertion of *in personam* jurisdiction reasonable. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952). This is often referred to as an assertion of "general" *in personam* jurisdiction. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. at 414 n.9, and authorities cited therein.[5]

On the other hand, "specific" jurisdiction requires a lesser showing of contacts with the forum state, so long as "the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S.

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[4] *See generally* Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689 (1987); Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. Fla. L. Rev. 293 (1987).

[5] In the present case, the court of appeals cited this Court's *Helicopteros* decision and correctly held that Carnival's contacts with the forum state were not sufficient to support an assertion of general jurisdiction. Pet. App. 6a-7a. This holding is unremarkable and does not present any issue for review in this Court.

462, 472 (1985) (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. at 414). In cases involving specific jurisdiction, "the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction." *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. at 415 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

This Court has recently considered a number of cases involving the constitutionality of an assertion of specific *in personam* jurisdiction, where the issue was whether a defendant had sufficiently directed its activities at the forum state so that it was foreseeable, and thus fair, to subject it to litigation arising out of or related to those activities. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (denying jurisdiction for suit involving product manufactured in a foreign country and placed in stream of commerce with knowledge that it would be sold in forum state; opinion for the Court limited to unfairness of asserting jurisdiction on particular facts of the case); *Burger King v. Rudzewicz, supra* (upholding jurisdiction for suit involving contractual relationship of nonresident franchisee); *Calder v. Jones*, 465 U.S. 783 (1984) (upholding jurisdiction for libel suit based upon distribution of publication in plaintiff's home state); *Keeton v. Hustler Magazine, Inc., supra* (upholding jurisdiction for libel suit by nonresident based upon regular distribution of publication to forum state); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (denying jurisdiction where automobile is sold to plaintiff and then driven to forum state). In none of these cases in which jurisdiction was found was there any doubt that the cause of action directly arose out of the activity that was asserted to form the requisite minimum contact between the defendant and the forum state.

This Court has had little occasion to consider the other part of the test for asserting specific personal jurisdic-

tion—whether the alleged contact with the forum state sufficiently "arises out of or relates to" the subject matter of the litigation. In *Keeton*, the Court noted that the activities of defendant Hustler Magazine, Inc. in the forum state might not have been sufficient to support general jurisdiction, but held that defendant's magazine sales supported jurisdiction over the libel suit, as the suit arose "out of the very activity being conducted, in part," in the state. 465 U.S. at 779-80. The issue was discussed in the dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. at 424-28, but the opinion of the Court declined to reach it on the ground that it had not been raised by the parties. *Id.* at 415-16 & n.10.

B. There Is a Serious Division of Authority on What Sort of Relationship Must Exist Between the Litigation and the Defendant's Activities in the Forum State So As to Support the Assertion of Specific Jurisdiction.

The court of appeals in this case perceived a conflict among the circuits on how to apply the "arising out of" requirement for asserting specific *in personam* jurisdiction and adopted what it viewed as the less restrictive test of "but for" causation rather than a more restrictive test of proximate cause. Pet. App. 15a.[6] The court of

[6] The court of appeals cited the following cases (Pet. App. 12a-15a) as supporting its test. *Cubbage v. Merchent*, 744 F.2d 665, 670 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir.), *cert. denied*, 109 S. Ct. 310 (1988); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981).

The court acknowledged (Pet. App. 12a) that it would have reached the opposite result if it had applied the legal test adopted by two other circuits. *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983). Both of those decisions were based upon the long-arm statutes themselves rather than the Fourteenth Amendment. However, in each case, the relevant statutory ground was an "arising out of" test identical to what the court of appeals in the present case regarded as constitutionally mandated.

appeals held that "but for" Carnival's promotional and advertising activities in the State of Washington, Mrs. Shute would not have taken the cruise on which she was injured, and therefore the injury "arises out of" the promotional and advertising activities. Pet. App. 17a.

The dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall* suggests that this issue should instead be framed in terms of whether specific jurisdiction may be asserted for lawsuits that "relate to" but do not "arise out of" the defendant's activities directed at the forum state. 466 U.S. at 420 (Brennan, J. dissenting). As noted above, the opinion of the Court declined to address the "validity or consequences of such a distinction . . . ." *Id.* at 415 n.10.

In addition to the foregoing, numerous other verbal formulae have been adopted by various courts in an effort to describe the relationship that is necessary between the defendant's activities and the litigation to support the exercise of specific *in personam* jurisdiction.[7]

These differences are not merely semantic but instead reflect a fundamental disagreement as to whether the necessary relationship should be weak or strong. Regardless of what verbal test they employ, the court of appeals in the instant case, the dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall*, and a number of state and lower federal courts have held that a relatively

[7] *See, e.g., City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985) ("coincides with"); *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 384 n.27 (6th Cir. 1968) ("substantial connection with"); *Southwire Co. v. Trans-World Metals & Co.*, 735 F.2d 440, 442 (11th Cir. 1984) ("connected with"); *Cornelison v. Chaney*, 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264, 268 (1976) ("substantial nexus"). Even within the dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall*, a variety of terms was employed to describe the necessary relationship. *See* 466 U.S. at 420 ("direct relationship"); *id.* at 426 ("directly related"); *id.* at 425 ("significantly related"); *id.* at 426 ("substantial relationship").

tenuous connection between a defendant's forum-related activities and the cause of action is sufficient to support specific *in personam* jurisdiction.[8] Other state and federal courts have required a much stronger connection to support an assertion of jurisdiction.[9] This division of authority among the courts has been accompanied by a vigorous debate on the same question among legal scholars.[10]

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[8] *See, e.g., Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 909-11 (6th Cir. 1988) (telephone conversations and correspondence with out-of-state accrediting body support jurisdiction for discriminatory denial of certification); *Cubbage v. Merchent*, 744 F.2d 665, 670 (9th Cir. 1984) (phone book listing and participation in Medi-Cal program for other patients support jurisdiction for out-of-state medical malpractice); *Cornelison v. Chaney*, 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264, 268 (1976) (upholding jurisdiction for out-of-state traffic accident where defendant was on his way to do business in forum state).

[9] *See, e.g., Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964) (sale of tickets through travel agency does not support jurisdiction for personal injury on out-of-state bus trip); *Scheidt v. Young*, 389 F.2d 58 (3d Cir. 1968) (advertising and telephone conversations do not support jurisdiction for personal injury at out-of-state lodge); *Camelback Ski Corp. v. Behning*, 312 Md. 330, 539 A.2d 1107, 1111-12 (1988) (toll-free telephone number and other solicitation activity do not support jurisdiction for personal injury at ski resort); *V & V Corp. v. American Policyholders' Ins. Co.*, 127 N.H. 372, 500 A.2d 695, 698-99 (1985) (no jurisdiction over out-of-state traffic accident where defendant was returning from business activities in forum state); *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307, 1310-12 (Utah 1980) (telephone call and unrelated sales activity do not support jurisdiction for alleged breach of oral contract).

[10] *See, e.g.*, von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966); Brilmayer, *How Contacts Count: Due Process Limitations and State Court Jurisdiction*, 1980 S. Ct. Rev. 77; Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction (Part II)*, 72 Calif. L. Rev. 1328, 1336-46 (1984); Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988); Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444 (1988); Twitchell, *A Rejoinder to Professor Brilmayer*, 101 Harv. L. Rev. 1465 (1988).

Where the assertion of *in personam* jurisdiction is not simply an effort to regulate the defendant's in-state activity, it becomes necessary to justify specific jurisdiction on the basis of the defendant's implied consent by virtue of those in-state activities. The expansive and restrictive approaches to specific jurisdiction can thus be regarded as corresponding to expansive and restrictive views of the level of in-state activity making it reasonable to impose the *quid pro quo* of submission to the state's courts disputes involving transactions or events occurring outside the state.

As the numerous citations in this petition suggest, the issue here presented arises frequently in litigation and is of substantial importance to the work of the federal and state courts. The Court should grant certiorari in this case to resolve the issue and provide important guidance to the state and lower federal courts to assist in the uniform implementation of this constitutional doctrine.

C. This Is an Appropriate Case for Resolving the Issue Presented.

This case presents a good context for deciding the issue presented because it involves the travel industry and the issue often arises in factual situations similar to those presented here.[11] In a typical case, a carrier or resort has some tenuous contacts with the forum state, consisting mostly of advertising and sale of tickets or reservations through independent travel agencies. A resident of the forum state is then injured in another jurisdiction, returns home, and sues the hotel, cruise line or airline. The state courts and lower federal courts have divided sharply on whether this fact pattern can support an assertion of *in personam* jurisdiction consistent with the Due Process Clause of the Fourteenth

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[11] *See* Knudsen, *Jurisdiction Over the Travel Industry: A Proposal to End Its Preferential Treatment*, 1983 B.Y.U. L. Rev. 101.

Amendment.[12] Petitioner has itself been subjected to conflicting resolutions of this issue.[13] In such cases, the inquiry could be characterized as turning on whether the out-of-state injury "arises out of or relates to" the advertising and promotional activity directed at the forum state.

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[12] Cases upholding jurisdiction, in addition to the present case, include *Kervin v. Red River Ski Area, Inc.*, 711 F. Supp. 1383 (E.D. Tex. 1989) (personal injury while descending steps of ski lodge); *Gullett v. Quantas Airways Ltd.*, 417 F. Supp. 490, 497 (D. Tenn. 1975) (airline failed to give passenger an emergency message from a relative until after take-off); *Hollingsworth v. Cunard Line Ltd.*, 152 Ga. App. 509, 263 S.E.2d 190 (1979) (action against steamship line for breach of contract and fraud); *Reed v. American Airlines, Inc.*, 197 Mont. 34, 640 P.2d 912 (1982) (contents of luggage lost by airline on which plaintiff was not a passenger). *Cf. Ladd v. KLM Royal Dutch Airlines*, 456 F. Supp. 422 (S.D.N.Y. 1978) (action for wrongful death of stewardess in aircraft collision).

Cases denying jurisdiction include *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986) (slip and fall in hotel room); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983) (personal injury at tourist attraction); *Scheidt v. Young*, 389 F.2d 58 (3d Cir. 1968) (injury during softball game at lodge); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964) (personal injury from bus crash); *Russo v. Sea World of Florida, Inc.*, 709 F. Supp. 39 (D.R.I. 1989) (personal injury in theme park); *Rutherford v. Sherburne Corp.*, 616 F. Supp. 1456 (D.N.J. 1985) (personal injury while disembarking from chair lift at ski resort); *Mulhern v. Holland America Cruises*, 393 F. Supp. 1298 (D.N.H. 1975) (slip and fall on cruise ship); *Camelback Ski Corp. v. Behning*, 312 Md. 330, 539 A.2d 1107 (1988) (personal injury from skiing accident); *Witbeck v. Bill Cody's Ranch Inn*, 428 Mich. 659, 411 N.W.2d 439 (1987) (fall from horse at dude ranch).

[13] *Compare Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D. Ill. 1987); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985) (jurisdiction found) *with Dirks v. Carnival Cruise Lines, Inc.*, 642 F. Supp. 971 (D. Kan. 1986) (jurisdiction not found).

It makes no difference that this petition for certiorari involves a federal question case arising under the admiralty jurisdiction of the federal courts. This Court's recent decision in *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987), holds that Rule 4(e) of the Federal Rules of Civil Procedure makes amenability to service of process in a federal question case dependent upon the permissible reach of the forum state's long-arm statute, unless there is some other federal rule or statute authorizing service. *Id.* at 103-05. Where, as here, the state long-arm statute is construed to reach the maximum extent permitted by the Fourteenth Amendment, the issue of *in personam* jurisdiction is identical to that presented in diversity cases, where Rule 4(e) also requires the federal court to rely upon the state long-arm statute.[14]

II. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO THE VALIDITY OF FORUM SELECTION CLAUSES IN PASSENGER TICKET CONTRACTS.

This case also presents the question of when a forum selection clause in a passenger ticket contract is enforceable, requiring dismissal or transfer of an action brought

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[14] This case thus does not present the issue, reserved in *Omni Capital* and *Asahi*, of whether Congress could create a more liberal standard for personal jurisdiction under the Fifth Amendment than would be permitted to a state under the Fourteenth Amendment. *See Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 (1987); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.* (1987) (Opinion of O'Connor, J.).

Here, Congress has not so provided, and this case is thus like most diversity and federal question cases in which a federal court is required by Rule 4(e) to serve nonresident defendants pursuant to the long-arm statute of the state in which it sits. Such state statutes are subject to the Fourteenth Amendment as construed by *International Shoe* and its progeny. *See generally* Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. 85, 130-40 (1983); 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1075 (1987).

before a forum other than the one specified in the contract. In a case involving an international commercial agreement, this Court has held that admiralty law establishes a strong presumption in favor of enforcing a forum selection clause. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (*"The Bremen"*). The Ninth Circuit in this case correctly stated that a cruise ticket is governed by the federal law of admiralty. *See Shute*, Pet. App. 21a.[15] It held that the test set forth by *The Bremen* is therefore controlling. *Id.* The panel found that the presumption of validity mandated by *The Bremen* was overcome on two grounds: first, because the clause was part of a preprinted contract and had not been bargained for, and second, because the inconvenience to the Shutes of litigating the claim in Florida would effectively deprive them of their day in court. Pet. App. 23a-24a.

In reaching this result, the Ninth Circuit has created a square conflict with the holding of the Third Circuit in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *petition for cert. dismissed*, 109 S. Ct. 1633 (1989).[16] The effectiveness of a forum selection clause is frequently a threshold issue in lawsuits stemming from injuries incurred during travel.[17] To re-

[15] *See also Archawski v. Hanioti*, 350 U.S. 532 (1956); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1886).

[16] The decision of the Ninth Circuit below is also in conflict with the decision of the Fourth Circuit in *Catalana v. Carnival Cruise Lines, Inc.*, 618 F. Supp. 18 (D. Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986). In that case, the district court ruled that the forum selection clause in the passenger ticket was incorporated into the terms of the contract between the carrier and the passenger and that the clause must be enforced. The district court also held that it lacked personal jurisdiction. The Fourth Circuit affirmed without issuing an opinion for publication.

[17] Numerous district courts have been confronted with the question of whether to enforce a forum selection clause in a passenger ticket contract. *See Everett v. Carnival Cruise Lines, Inc.*, 677 F. Supp. 269 (M.D. Pa. 1987); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563 (S.D.N.Y. 1987); *Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D. Ill. 1987); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985). The clauses were enforced in all of these cases. In the litigation leading to *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976 (1989), the district court held that the forum selection clause was not enforceable. *See Klinghoffer v. Achille Lauro*, 1988 A.M.C. 636 (S.D.N.Y. 1987).

solve the intercircuit conflict on this issue, the Court should grant certiorari in this case.[18]

A. Federal Admiralty Law Strongly Favors Enforcement of Forum Selection Clauses.

In *The Bremen*, the Court upheld a forum selection clause in a maritime contract requiring that any disputes be brought before the London Court of Justice. The contract was for the towing of an oil drilling rig from Louisiana to the Adriatic Sea. After the oil rig was damaged while being towed, it was brought to port in Tampa, Florida. The owner of the rig sued in federal district court in Tampa rather than in the contractual forum. 407 U.S. at 3-4. The district court and the court of appeals rejected the defendant's motion to dismiss or stay based on the forum selection clause, holding that the defendant had not met its burden to show that London would be a more convenient forum than Tampa. *Id.* at 6-7.[19]

[18] In *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976 (1989), this Court held that an order denying a motion to dismiss for failure to comply with a forum selection clause is not immediately appealable. There is no issue in this case as to whether the district court's decision was appealable; the dismissal of the Shute's action unquestionably constituted a final order.

[19] The court of appeals also relied partly on the likelihood that the London court would enforce an exculpatory clause in the contract, relieving the defendant of liability in contravention of U.S. admiralty law. *Id.* at 3 n.2, 8. There is, of course, no issue as to choice of law in this case; federal admiralty law will govern the

This Court reversed. Rather than placing the burden on the defendant, the Court held, "the forum selection clause should control absent a strong showing that it should be set aside." *Id.* at 15. The Court stated that the plaintiff "must clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* At least as to "a freely negotiated international commercial transaction," *id.* at 17, the Court held that "it should be incumbent upon the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18. It is not enough for the plaintiff to show only that "the balance of convenience is strongly in favor of" a non-contractual forum. *Id.* at 19. Even where "the agreement was an adhesive one," the Court stated that "the party claiming should bear a heavy burden of proof." *Id.* at 17.

Decisions of the courts of appeals, pre- and post-*Bremen*, have enforced conditions in passenger cruise ticket contracts, provided that the tickets gave reasonable notice to the passenger of the existence of additional terms in the contract. The First, Second, Third, and Fifth Circuits have upheld the validity of contract terms requiring that the passenger notify the carrier of any claims within a specified period or that the passenger bring suit within a specified period.[20] The Second Circuit

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Shutes' claim whether brought in Washington or Florida. Under 46 U.S.C. § 183c, an exculpatory clause in a ticket contract cannot limit a carrier's liability to its passengers for negligence or fault. *See* pp. 19-22 *infra*.

[20] *See Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983); *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5 (1st Cir. 1981); *Geller v. Holland-America Line*, 298 F.2d 618 (2d Cir. 1962); *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 484 U.S. 852 (1987); *Carpenter v. Klosters Rederi*, 604 F.2d 11 (5th Cir. 1979); *Miller v. Lykes Bros. S.S. Co.*, 467 F.2d 464 (5th Cir. 1972).

In some cases, courts of appeals have held a term not to bind a passenger because the ticket did not give sufficiently conspicuous notice of the existence of additional terms or because the passenger did not receive the ticket at all until boarding. *Muratore v. M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988); *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968); *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983); *see also The Majestic*, 166 U.S. 375 (1897).

has upheld a choice of law clause providing that English law would govern.[21]

B. The Decision Of The Ninth Circuit In This Case Is Squarely In Conflict With That Of The Third Circuit In *Hodes*.

In *Hodes*, the Third Circuit enforced a forum selection clause in a preprinted passenger ticket contract. Although the *Shute* decision does not refer to the Third Circuit's contrary analysis and result in *Hodes*, the issues pertaining to the forum selection clauses in the two actions are essentially identical. The clause in *Hodes* was, if anything, more burdensome than the one at issue here, as it required that all claims be brought in Naples, Italy.

The Hodeses brought suit in federal district court in New Jersey for claims based on the October 7, 1985 terrorist seizure of the *Achille Lauro*, on which they were passengers. The district court denied the defendants' motion for dismissal, holding the clause unenforceable. The court of appeals reversed. The court of appeals first considered, under the standard set forth in *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir. 1987), whether the forum selection clause was reasonably communicated to the Hodeses. The court noted that the cover included a statement referring passengers to

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[21] *See Siegelman v. Cunard White Star Line, Ltd.*, 221 F.2d 189 (2d Cir. 1955).

the contract terms printed inside; the ticket coupons themselves included a statement that they were "subject to the terms, conditions and regulations set out herein." *Hodes*, 858 F.2d at 910. The page of terms and conditions was captioned, "TERMS AND CONDITIONS OF CONTRACT OF PASSAGE AND BAGGAGE." The forum selection clause was article 31 of 32 articles. *Id.* Because the various statements gave the Hodeses reasonable notice of the clause, the court held that it was incorporated into the contract for passage. *Id.* at 910-11.[22]

Second, having determined that the forum selection clause was incorporated into the contract, the court considered whether it should be enforced. The Third Circuit in *Hodes*, like the Ninth Circuit in *Shute*, held that *The Bremen* was controlling. *Id.* at 912. In applying *The Bremen*, however, the Third Circuit rejected the very arguments that the Ninth Circuit accepted as to the enforceability of the clause. The Third Circuit acknowledged that the contract in *The Bremen* was the product of negotiation between sophisticated businesses, and that the defendants in *Hodes* had a superior bargaining position to the ticket purchasers, but held that the defendants "did not take unfair advantage of that position to 'overween' the Hodeses." *Id.* at 913. The court pointed out that the defendants were contracting with purchasers worldwide and that the ship itself would enter a number of jurisdictions. As a result, the court found, the defendants had a legitimate interest in seeking certainty as to where suit could be brought against them. *Id.*

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[22] As was the situation in *Shute*, Pet. App. 23a n.11, the Hodeses did not receive the terms and conditions until after they purchased the tickets. In fact, the Hodeses contended that their tickets were held for them by the travel club through which they purchased the tickets until they boarded the ship. 858 F.2d at 911-12. The Third Circuit noted that the Hodeses could have requested an opportunity to review the tickets in advance and held that, in any event, the club was serving as agent for the Hodeses; the Hodeses were consequently charged with notice of the terms. *Id.* at 912.

The Third Circuit also rejected the view that "trial in the contractual forum will be so gravely difficult and inconvenient" that the Hodeses would "for all practical purposes be deprived of [their] day in court." *Id.* at 916 (*quoting The Bremen*, 407 U.S. at 18). The Hodeses could not show either that they "would face blatant prejudice in the foreign forum" or that litigation in the contractual forum "would be severely impractical." 858 F.2d at 916. In assessing the practicality of litigation in the contractual forum, the Third Circuit stated that the inquiry is not whether the forum is convenient for the plaintiffs, but whether there are circumstances making it impractical for the dispute to be litigated there at all.[23] In contrast, the Ninth Circuit considered only the convenience to plaintiffs and their witnesses, the limited and one-sided inquiry that the Third Circuit rejected. Pet. App. 24a.

C. The Ninth Circuit Improperly Disregarded 46 U.S.C. §§ 183b and 183c.

Two provisions of the Limited Liability Act[24] are relevant to this case. Under 46 U.S.C. § 183b, a carrier cannot impose a period of less than six months for the passenger to give notice of a claim or less than one year for a passenger to file suit. Pet. App. 66a-67a. Under 46 U.S.C. § 183c, a carrier cannot limit its liability to its passengers for negligence or fault. Pet. App. 67a-68a.

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[23] The Hodeses also advanced a public policy argument, based on 46 U.S.C. §§ 183b and 183c and on common law, that the forum selection clause was invalid because Italian law might enforce provisions of the contract limiting the amount of defendant's liability for negligence. 858 F.2d at 914-15. Following *The Bremen*, the court rejected that argument. *Id.* As noted earlier, no such issue of choice of law is present in this case. *See* p. 15 n.19 *supra*. The effect of §§ 183b and 183c is considered further in the following section of this petition.

[24] 46 U.S.C. §§ 181 *et seq.*

Neither of these provisions, nor any other applicable statutes, refer to forum selection clauses.

In setting forth these specific limitations on passenger ticket contracts, Congress created only a limited regulatory scheme. The Ninth Circuit sidestepped the applicability of §§ 183b and 183c in an interesting manner, however. Rather than looking first to the relevant statutes to determine whether they are applicable, the court stated that "[b]ecause we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of [§ 183c] on forum selection agreements." Pet. App. 23a n.12. The court then suggested that, notwithstanding the specific nature of the statutory limitations, the decision of Congress to enact the limitations "exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners" and thereby establishes a requirement that courts undertake an "independent examination of the fairness of this type of contract." *Id.*

The court drew precisely the wrong conclusion from Congress's silence as to forum selection clauses. By not providing that forum selection clauses were among the abusive conditions that Congress sought to prohibit in §§ 183b and 183c, the statute lends support to the validity of such clauses. *Expressio unius est exclusio alterius.* The texts of these statutory provisions cannot legitimately be read as invitations to the judiciary to conduct an independent examination of a contract's fairness.

In the somewhat analogous context of the Carriage of Goods by Sea Act ("COGSA"),[25] the First Circuit has upheld a forum selection clause in a bill of lading that required suit in New York. *See Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974). The court rejected the argument

[25] 46 U.S.C. §§ 1300 *et seq.*

that a forum selection clause in a bill of lading is invalid under 46 U.S.C. § 1303(8) as a limitation of liability. Section 1303(8), like § 183c, nullifies any clause lessening a carrier's liability. The First Circuit declined to infer from that provision either a specific prohibition on forum selection clauses or a general policy in favor of scrutinizing such clauses for lack of fairness.

Where forum selection clauses in bills of lading required suit overseas, several courts of appeals have held that forum selection clauses are invalid as limitations of liability under § 1303(8). *See Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203-04 (2d Cir. 1967); *Union Ins. Soc'y, Ltd. v. S.S. Elikon*, 642 F.2d 721, 724-25 (4th Cir. 1981); *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987); *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989). These courts treated forum selection clauses as limitations of liability on the ground that enforcing the clauses could effectively reduce the liability of the carrier; the foreign courts might apply the controlling law differently than U.S. courts, and the clauses create an obstacle for the plaintiff in bringing suit.

The cases interpreting § 1303(8) in this manner may well have been wrongly decided. Like § 183c, § 1303(8) does not expressly prohibit forum selection clauses, and indeed should be read to approve of such clauses by omission. *See William H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806, 807 (2d Cir. 1955), *overruled, Indussa, supra.*[26] Applying the rationale of these cases to § 183c would be more problematic still, as it would render § 183b entirely superfluous. If § 183c is read to invalidate procedural clauses that create an obstacle for the plaintiff, then the restrictions set forth in

[26] This Court cited *William H. Muller & Co.* with approval in *The Bremen* and distinguished *Indussa* on the ground that § 1303(8) "is not applicable in this case." 407 U.S. at 10 n.11.

§ 183b on time limits could equally well be grounded in § 183c. In fact, § 183c could then be used to create stricter restrictions on time limits than the explicit restrictions in § 183b.

In any event, because the forum selection clauses in *Indussa*, *Union Insurance*, *Conklin & Garrett*, and *Hughes Drilling Fluids* required suit overseas,[27] these cases are distinguishable from a case such as *Shute* that involves interstate rather than international forum selection. The First Circuit distinguished *Indussa* on that basis in *Fireman's Fund*. *See* 492 F.2d at 1296. Regardless of the state in which the Shutes bring the action, federal admiralty law will apply, and the Shutes will be entitled to appeal any erroneous application of that law within the same federal court system.

D. This Is An Appropriate Case For Resolving The Issue Presented.

This case presents an occasion for the Court to resolve an intercircuit conflict regarding an issue that arises frequently in the district courts.[28] Further, the enforcement of forum selection clauses is now less likely to reach this Court than it once was—not because the issue is occurring less often in the district courts, but because this Court's decision in *Lauro Lines* regarding interlocutory appeals renders such a dispute less likely to be brought to the courts of appeals in any particular case.

The intercircuit conflict on this issue was not resolved by this Court's recent decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). The court of appeals distinguished *Stewart* on the ground that it in-

[27] The clause in *Indussa* required suit in Norway; the clause in *Union Insurance* required suit in Germany; the clause in *Conklin & Garrett* required suit in Finland; and the clause in *Hughes Drilling Fluids* required suit in the People's Republic of China.

[28] *See* p. 14 n.17 *supra*.

volved a motion to transfer under 28 U.S.C. § 1404(a), whereas the present case involved a motion to dismiss or transfer under § 1406(a). Pet. App. 21a n.9. This is probably a valid distinction, although *Stewart*'s indication of a general policy of giving weight to forum selection clauses should have been taken into account by the court of appeals. *See Stewart*, 487 U.S. at 29, 31; *id.* at 33 (Kennedy, J., concurring).[29]

As the Third Circuit noted in *Hodes*, carriers have a legitimate interest in limiting disputes contractually to one forum, especially where multiple claims arise from a single incident. The *Hodes* litigation and the *Lauro Lines* litigation, both arising from the *Achille Lauro* tragedy, illustrate the possibility of related claims being brought in various jurisdictions. The proliferation of doctrinal approaches to the enforcement of forum selec-

[29] Some courts have misconstrued the *Stewart* decision to hold that forum selection clauses can never form the basis of a motion to transfer or dismiss under § 1406(a) but can only be a factor in considering transfer under § 1404(a). *See, e.g., Southern Distrib. Co. v. E. & J. Gallo Winery*, 718 F. Supp. 1264, 1267 (W.D.N.C. 1989). However, *Stewart* was a diversity case. Whether the forum selection clause there was enforceable as a matter of contract law would have been a question of state rather than federal law. A valid forum selection clause could support a motion to dismiss or transfer under § 1406(a), without regard to the other discretionary factors considered in deciding whether a forum is convenient for purposes of § 1404(a). *See D'Antuono v. CCH Computax Sys., Inc.*, 570 F. Supp. 708, 710 (D.R.I. 1983); 15 C. Wright & A. Miller, *Federal Practice and Procedure* § 3847, at 372 n.10 (1976). The only issue before the Court in *Stewart* was a motion to transfer under § 1404(a), which was held to be a procedural issue to be decided as a matter of federal rather than state law. 487 U.S. at 32.

In any event, this is an admiralty case, where the validity of a contractual forum selection clause is a question of federal law. As in *The Bremen*, a valid clause is enforceable in its own terms and not as one of many factors in the convenience analysis of § 1404(a). There is no indication that *Stewart* was intended to modify the holding of *The Bremen* in this regard.

tion clauses can serve only to defeat the certainty and stability that they are intended to achieve.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4063

D.C. No. CV-86-1204-D

EULALA SHUTE, and RUSSEL SHUTE,
Plaintiffs-Appellants,

v.

CARNIVAL CRUISE LINES,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Demmick, District Judge, Presiding

Argued and Submitted
October 5, 1988—San Francisco, California

Filed December 12, 1988
Withdrawn April 27, 1989
Amended and refiled: February 22, 1990

Before: Betty B. Fletcher, Robert Boochever and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Fletcher

AMENDED OPINION

Gregory J. Wall, Brousseau, Wall & Jankovich, Seattle, Washington, for the plaintiffs-appellants.

Jonathan Rodriguez-Atkatz, Bogle & Gates, Seattle, Washington, for the defendant-appellee.

FLETCHER, Circuit Judge:

Plaintiffs Eulala and Russell Shute appeal the district court's decision to grant the defendant's motion for summary judgment, dismissing their suit for damages. The district court granted the motion on the grounds that the defendant's forum-related activities were insufficient to support the exercise of personal jurisdiction in a manner consistent with due process. We reverse.

BACKGROUND

The defendant-appellee, Carnival Cruise Lines, is a Panamanian corporation with its principal place of business in Miami, Florida. It is undisputed that Carnival is not registered to do business in the State of Washington. It owns no property in Washington, maintains no office or bank account in Washington and pays no business taxes in Washington. It has never operated ships which have called at Washington ports. It has no exclusive agent in Washington. Carnival does, however, advertise its cruises in local Washington newspapers. It also provides brochures to travel agents in Washington, which in turn are distributed to potential customers. Carnival also periodically holds seminars for travel agents in the State of Washington to inform them about, and encourage them to sell, Carnival cruises. Carnival pays travel agencies a 10% commission on proceeds from tickets sold for Carnival cruises.

The plaintiff-appellants, who are Washington residents, purchased tickets through Smokey Point Travel in Arlington, Washington for a seven day cruise on a Carnival

Cruise Lines ship, the TROPICALE. The appellants were to embark in Los Angeles, California, sailing from there to Puerto Vallarta, Mexico. The tickets were purchased through the travel agent, who forwarded payments to Carnival in Miami. The tickets were issued in Florida, then forwarded to the appellants in Washington.

The passage contract ticket contained a forum selection clause that provided as follows:

> It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.

The appellants' cause of action arises from injuries suffered by Mrs. Shute when she slipped on a deck mat while on a guided tour of the ship's galley. This incident occurred in international waters off the coast of Mexico. The Shutes allege that the fall was due to the negligence of Carnival and its employees, and request damages arising out of personal injuries to Mrs. Shute.

Carnival moved for summary judgment on two grounds: first, that the district court lacked personal jurisdiction over Carnival; and second, that the passenger ticket contract required the Shutes to bring all claims against Carnival in the Florida courts. In the alternative, Carnival requested a transfer of the case to the U.S. District Court for the Southern District of Florida. The court addressed only the first issue, ruling that it lacked personal jurisdiction over Carnival. The Shutes timely appeal.

DISCUSSION

I. *Burden of Proof/Standard of Review*

The plaintiff has the burden of establishing that the court has personal jurisdiction. *Cubbage v. Merchent*, 744 F.2d 665, 667 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005

(1985). Where the trial court's ruling is based solely upon a review of affidavits and discovery materials, dismissal is appropriate only if the plaintiff fails to make a *prima facie* showing of personal jurisdiction. *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986); *Data Disc, Inc. v. Systems Tech. Assoc.*, 557 F.2d 1280, 1285-86 (9th Cir. 1977). *Cf. Haisten v. Grass Valley Med. Reimbursement Fund*, 784 F.2d 1392, 1396, n.1 (9th Cir. 1986) (where defendant challenges judgment entered against it on the merits, the plaintiff bears the full burden of proof of personal jurisdiction by the preponderance of the evidence).

A district court's determination that personal jurisdiction can properly be exercised is a question of law reviewable *de novo* when the underlying facts are undisputed. *Haisten*, 784 F.2d at 1396. For the purposes of this appeal, we treat the plaintiffs' allegations as correct. *Fields*, 796 F.2d at 301.

II. *Personal Jurisdiction*

This action was brought in admiralty in the U.S. District Court for the Western District of Washington. In order to establish personal jurisdiction, the Shutes must demonstrate that the forum state's jurisdictional statute confers personal jurisdiction, and that the exercise of jurisdiction accords with federal constitutional principles of due process. *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985).

Washington's jurisdictional statute provides, in relevant part, as follows:

> Any person whether or not a citizen or resident of this state, who, in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from

> the doing of said acts: (a) the transaction of any business within the state . . . .

Wash. Rev. Code 4.28.185. (West 1988). This statute has been construed by the Supreme Court of Washington to permit the assertion of jurisdiction to the extent permitted by due process, except where limited by the terms of the statute. *Deutsch v. West Coast Machinery Co.*, 80 Wash. 2d 707, 497 P.2d 1311 (1972).[1] For our purposes, "the statutory and constitutional standards merge into a single due process test." *Pedersen Fisheries, Inc. v. Patti Industries*, 563 F.Supp. 72, 74 (W.D. Wash. 1983).[2]

Considerations of due process require that non-resident defendants have certain minimum contacts with the forum state, so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). However, the nature and quality of the necessary contacts required vary, depending upon the type of jurisdiction asserted.

Courts may exercise either general or specific jurisdiction over non-resident defendants. General jurisdiction exists where the non-resident defendant has " 'substantial'

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[1] This opinion was withdrawn by order of the panel certifying to the Supreme Court of Washington the question of whether the Washington long-arm statute would confer personal jurisdiction over Carnival Cruise Lines for the claim asserted by the Shutes. The Supreme Court has now held "that the business activities of the cruise line in [the State of Washington] permits the assertion of jurisdiction." *Shute v. Carnival Cruise Lines*, No. 56089-7, slip op. (Wash. Dec. 7, 1989). The opinion is refiled as modified herein.

[2] Where jurisdiction is asserted under § 4.28.185(1)(a), the "transaction of any business" provision, the Washington courts apply a three factor test that is virtually identical to the specific jurisdiction due process test employed by this circuit. *Compare Deutsch*, 497 P.2d at 1314 *with Haisten*, 784 F.2d at 1397. We therefore conclude that the Washington long-arm statute imposes no limitations beyond those imposed by due process.

or 'continuous and systematic' contacts with the forum state." *Fields*, 796 F.2d at 301 (quoting *Haisten*, 784 F.2d at 1396). A court exercising general jurisdiction over a defendant may hear cases unrelated to the defendant's forum-related activities. *Id.*

The level of contact with the forum state necessary to establish general jurisdiction is quite high. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984) (no jurisdiction over foreign corporation that sent officers to forum for a negotiating session, accepted checks drawn from a forum bank, purchased equipment from the forum, and sent personnel to the forum to be trained); *Cubbage*, 744 F.2d at 667-68 (no general jurisdiction over non-resident doctors despite significant number of patients in forum, use of forum's state medical insurance system and telephone directory listing that reached forum); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (no general jurisdiction over defendants despite several visits and purchases in forum, solicitation of contract in forum which included choice of law provision favoring forum, and extensive communication with forum), *cert. denied*, 471 U.S. 1066 (1985); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242-43 (9th Cir. 1984) (foreign corporation's sales and marketing efforts in forum state, including solicitation of orders, promotion of products to potential customers through the mail and through showroom displays, and attendance at trade shows and sales meetings, were insufficient contact to assert general jurisdiction).

Carnival's contacts with the State of Washington are insufficient to support an exercise of general jurisdiction. Carnival has no offices and no exclusive agents in Washington, it is not registered to do business there, and it pays no taxes there. These factors militate against the exercise of general jurisdiction. *See Fields*, 796 F.2d at 302. Its contacts are limited to advertising in the local media, the mailing of brochures and the payment of commissions to travel agents, the conducting of promotional seminars, and the sale of its vacation cruises to residents of Washington. Only 1.29% and 1.06% of Carnival's cruise business was derived from residents of Washington in 1985 and 1986, respectively. This court has held under somewhat similar facts that the exercise of general jurisdiction would violate due process. *See Congoleum*, 729 F.2d at 1243.

If the non-resident defendant's activities within the forum are not sufficiently pervasive to justify the exercise of general jurisdiction, a court may nevertheless assert jurisdiction for a cause of action arising out of the defendant's activities within the forum. The Ninth Circuit has devised a three-part test to determine whether the exercise of this "specific" jurisdiction comports with due process: (1) The defendant must have done some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Haisten*, 784 F.2d at 1397; *Data Disc*, 557 F.2d at 1287.

1. *Purposeful Availment*

Purposeful availment requires that the defendant engage in some form of affirmative conduct allowing or promoting the transaction of business within the forum state. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 840 (9th Cir. 1986). This focus upon the affirmative conduct of the defendant is designed to ensure that the defendant is not haled into court as the result of random, fortuitous or attenuated contacts, or on account of the unilateral activities of third parties. *See e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (purchaser's unilateral act of bringing defendant's product into

the forum state provides an insufficient basis for the exercise of personal jurisdiction over the defendant).

This circuit has held that a non-resident defendant's act of soliciting business in the forum state will generally be considered purposeful availment if that solicitation results in contract negotiations or the transaction of business. *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988); *Decker Coal*, 805 F.2d at 840 ("if the defendant directly solicits business in the forum state, the resulting transactions will probably constitute the deliberate transaction of business invoking the benefits of the forum state's laws").

In *Sinatra*, the plaintiff filed suit in California against Clinic La Prairie, a Swiss health clinic, for misappropriation of his name and likeness. The *National Enquirer* had done a full feature on the Clinic in exchange for Clinic officials' agreement to make false statements regarding Frank Sinatra's alleged stay at the Clinic. Sinatra had never visited the Clinic. The court ruled that the Clinic's advertisements in the forum state, coupled with its misappropriation of Sinatra's name through the *Enquirer* article, were sufficiently directed toward the forum to satisfy the purposeful availment prong of the *Data Disc* test. 854 F.2d at 1195-98.

The *Sinatra* court's premise that solicitation of business in the forum state will support a finding of purposeful availment has substantial support in *Asahi Metal Indus. Co. v. Superior Court of Solano County*, 480 U.S. 102 (1987). Justice O'Connor, writing for a four-Justice plurality, noted that conduct such as "designing the product for the market in the forum State, establishing channels for providing regular advice to customers in the forum State, advertising in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State[,]" may evidence purposeful availment. 480 U.S. at 112. The plurality relied upon the absence of these factors to conclude

that Asahi did not purposefully avail itself of the California market. *Id.*[3]

In light of these cases, it is difficult to conclude that Carnival did not purposefully avail itself of the laws of Washington. It advertised in the local media, promoted its cruises through brochures sent to travel agents in that state, and paid a commission on sales of cruises in that state. In addition, Carnival conducted promotional seminars in Washington designed to increase its sales to residents of that state. Carnival's efforts to solicit business in Washington were more extensive than those of the defendant Clinic in *Sinatra*, which consisted of advertisements in a few periodicals circulated in California. *Sinatra*, 854 F.2d at 1196.[4]

Carnival maintains that the fact it has never "consummated" a transaction in Washington precludes a finding of purposeful availment. In Carnival's view, the fact that the ticket is issued in Florida after receipt of payment and the fact that the cruise takes place completely outside of Washington State are decisive. This misses the point. As

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[3] Justice Brennan, writing for four members of the Court, maintained that the absence of "additional conduct" such as advertisement in the forum state was irrelevant. In his view, placing the goods in the stream of commerce with the knowledge that they will reach the forum state, when considered in light of the economic benefit received from sales in the forum, is sufficient to establish purposeful availment. 480 U.S. at 117, (Brennan, J., concurring). Under this standard, it is possible that Carnival's knowledge that ticket sales were being made to Washington residents is, in itself, sufficient to establish that Carnival purposefully availed itself of the benefits and protections of Washington law. We need not reach that question, however, because Carnival engaged in three of the four types of conduct mentioned by O'Connor. We view these actions to be sufficient to meet the purposeful availment test.

[4] It should be noted, however, that in analyzing whether the defendant Clinic had directed its activities toward California, the court also considered the effects in the forum of the defendant's acts. Thus, the fact that California was the situs of the tortious injury was a factor which led the court to find purposeful availment. 854 F.2d at 1196-98. That factor is not present in this case.

the Supreme Court has explained, the reality of modern commercial life is that many transactions take place solely by mail or wire across state lines, obviating the need for physical presence in the state toward which the defendant's activities are directed. Thus, the Court has held that the physical absence of the defendant and the transaction from the forum cannot defeat the exercise of personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *see also Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 907 (6th Cir. 1988), *cert. denied* 57 U.S.L.W. 3313 (U.S. Nov. 1, 1988) (No. 88-403) ("Neither the presence of the defendant in the state, nor actual contract formation need take place in the forum state for defendant to do business in that state.").

The actions taken by Carnival to solicit business within the State of Washington were clearly purposefully directed toward residents of Washington. To that extent, it is irrelevant where the tickets are issued or where the cruise takes place. In addition, Carnival's argument ignores the fact that the promotional seminars actually took place within the state. In short. Carnival's actions were more than sufficient to meet the purposeful availment test.

2. *Arising Out of*

The second prong of the three-part *Data Disc* test requires that the claim must "arise out of" the defendant's forum-related activities. Carnival maintains that the Shutes' claim, which is based on allegations of negligence with respect to conditions on the TROPICALE, does not "arise out of" Carnival's business solicitation contacts with Washington.

Carnival points to several cases outside this circuit supporting its contention that, for purposes of personal jurisdiction, "slip and fall" claims do not arise out of the defendant's business solicitation activities in the forum. *See Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d

1067 (8th Cir. 1983). *See also Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964) (plaintiff's injuries sustained while on defendant's bus tour did not arise from defendant's forum activities, where those activities consisted of ticket sale through independent travel agent in the forum).

In *Marino* the plaintiff, a resident of Massachusetts, sued Hyatt, a Delaware corporation with its principal place of business in Illinois, for injuries incurred at one of the defendant's hotels. The plaintiff had made reservations through a Massachusetts travel agent to stay at the defendant's Hyatt Regency Hotel in Maui, Hawaii. The plaintiff slipped in the bathtub of her Hawaii hotel room, sustaining injuries. The court of appeals affirmed the district court's dismissal of her ensuing personal injury claim for lack of personal jurisdiction.

Basing its decision on an interpretation of the Massachusetts long-arm statute, the court acknowledged that Hyatt transacted business in Massachusetts. However, the court concluded that the claim, stemming from Mrs. Marino's fall in the bathtub in Hawaii, did not "arise from" the reservation contract entered into in Massachusetts. 793 F.2d at 430.[5]

In *Pearrow* the plaintiff, an Arkansas resident, slipped and fell on the floor of the Hospitality Suite at Opryland USA in Nashville, Tennessee. He brought an action in Arkansas against the owner of Opryland, National Life. The district court dismissed the case for lack of jurisdiction, noting that the cause of action did not arise out of the defendant's activities in Arkansas, and that the Arkansas long-arm statute therefore provided no basis for the exercise of jurisdiction. The court of appeals affirmed.

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[5] The court distinguished *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983) (a cause of action for breach of contract arose from law school's act of sending recruiters to Massachusetts). In the court's view, a cause of action for breach of contract was distinguishable from a cause of action alleging a negligent tort.

Noting that National was registered to conduct insurance business in Arkansas, the court concluded that the plaintiff's Tennessee injury had nothing to do with that insurance business. More important, the court concluded that National's act of sending brochures into Arkansas soliciting visits to Opryland was "too tenuous" a connection to support jurisdiction. 703 F.2d at 1069.

Were this court to apply the "arising from" analysis of *Marino* and *Pearrow* to this case, we would conclude that Mrs. Shute's fall did not arise out of Carnival's solicitation of business in Washington. Rather, we would find that her injuries arose out of the negligent failure to maintain a safe passageway through the galley of the TROPICALE. However, *Cubbage v. Merchent*, 744 F.2d 665, suggests that this circuit has not adopted such a stringent standard of causation in evaluating whether a court has specific jurisdiction.

In *Cubbage*, this court was faced with a medical malpractice suit brought in a federal district court in California by a California resident against two doctors and a hospital located in and licensed in Arizona. Although the doctors were not licensed to practice in California, they applied for and were issued California Medi-Cal numbers. Both doctors and the hospital were listed in a telephone directory which was distributed in the area of California lying adjacent to Arizona, and a significant number of the defendants' patients (including Cubbage) were California residents.

Applying the *Data Disc* test, the court held that the exercise of specific jurisdiction did not offend due process. Of particular relevance is the court's holding that the appellant's malpractice claim arise out of the defendant's solicitation of patients from California, 744 F.2d at 670. Had the *Cubbage* court applied reasoning similar to that utilized in the cases cited by Carnival, Cubbage's claim would have arisen out of the doctor's negligent treatment of Cubbage in Arizona, not out of the business solicitation

activities in California. In our view, *Cubbage* must be read as a rejection by this circuit of the rigid causation standard advanced by Carnival.

Decisions by at least two other courts of appeal support the view that a tort can arise from prior business solicitation in the forum state. *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir. 1988); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981). These courts apply a "but for" test of casuality in this type of situation.

Lanier involved allegations of sex discrimination in the certification procedure employed by the defendant Board. The plaintiff, a licensed Michigan dentist, sought certification by the defendant through its Chicago, Illinois headquarters. Dr. Lanier twice failed the oral examination required for certification, once in Phoenix, once in Chicago. She then filed suit in Michigan. The district court ruled that it lacked personal jurisdiction over the defendant, but the appellate court reversed.

The Sixth Circuit court first determined that the Board's contacts with the State of Michigan, which consisted of the collection of application fees from Dr. Lanier, together with a series of telephone calls and written correspondence to Dr. Lanier in Michigan, were sufficient to constitute "the transaction of any business" within the meaning of the long-arm statute. The court then considered whether the "arising out of" requirement of the long-arm statute was fulfilled. The Board argued that the plaintiff's cause of action arose from the allegedly unfairly evaluated oral examinations given in Arizona and Illinois rather than from its contacts with Dr. Lanier in Michigan. The court rejected this argument, commenting that it was "unpersuaded that the plaintiff's relationship and contacts with the defendant Board can be logically or legally fragmented in that fashion." 843 F.2d at 908.

In the court's view, the entire course of events underlying Dr. Lanier's claim was an uninterrupted whole which

began with, and was uniquely made possible by, the Board's contacts in Michigan. But for those contacts, the cause of action would never have come about.

> Whether the decision to discriminate occurred before, during, or after the oral examination administered to the plaintiff is not controlling . . . [I]t arose from, was occasioned by, and would not have occurred but for the totality of Dr. Lanier's efforts to obtain Board certification—efforts which derived, as we have held, from the defendant's limited business contacts with Dr. Lanier in Michigan.

843 F.2d at 908-09.

The Fifth Circuit expressed similar sentiments in *Prejean*. In that case, survivors of employees allegedly under contract with Sonatrach, the Algerian national oil company, brought a wrongful death action in Texas against Sontatrach, Air Algeria and Beech Aircraft Corporation. The plaintiffs alleged that their spouses, while in Algeria performing duties pursuant to a contract with Sonatrach, died when a plane chartered by Sonatrach crashed.

Applying the Texas jurisdictional statute, the district court dismissed the action as to all three defendants for want of personal jurisdiction. The court of appeals affirmed as to Air Algeria and Beech, but reversed and remanded for further discovery as to jurisdiction over Sonatrach.[6]

The key analysis for our purposes appears in footnote 21, where the court addressed Sonatrach's argument that the existence of the contract with the decedents' firm would be insufficient to satisfy the "arising from" requirement of the jurisdictional statute. Sonatrach argued that a tort suit cannot arise from a contractual contact with the

[6] The defendant disputed the existence of the only contact to the forum, the alleged contract between Sonatrach and the decedents' Dallas engineering firm. Thus, the court required more information about the possible existence of that contract.

forum. The court responded with the following observation:

> Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a "but for" causative factor for the tort since it brought the parties within tortious "striking distance" of one another. While the relationship between a tort suit and a contractual contact is certainly more tenuous than when a tort suit arises from a tort contact, that only goes to whether the contact is by itself sufficient for due process, not whether the suit arises from the contact.

652 F.2d at 1270, n. 21.

Our circuit, in *Cubbage v. Merchent*, implicitly adopted the "but for" test in analyzing whether a cause of action arises from a defendant's continuing efforts to solicit business in the forum state. Today, we make its adoption explicit.[7] We agree with the Fifth and Sixth Circuits that the proximate cause approach of *Marino* and *Pearrow* unnecessarily limits the ordinary meaning of the "arising out of" language. Moreover, application of a "but for" standard is more consistent with cases finding jurisdiction over manufacturers of defective goods sent into a forum state. *See e.g., Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355, 1358 (9th Cir. 1983) (Oregon longshoreman's negligence claim against Japanese manufacturer of defective wire rope splice held to arise from delivery of the splices into commerce). In contract, application of the *Marino* standard would compel the conclusion that such claims arise from negligence in manufacture and design, rather than from forum-related activity.

[7] We note that where a defendant has only one contact with the forum state, a close nexus between its forum-related activities and the cause of the plaintiffs' harm may be required. *See Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1983). The case before us in which defendant had engaged in significant and continuing efforts to solicit business in the forum state is more like *Cubbage*. *See Cubbage*, 747 F.2d at 665.

The "but for" test is consistent with the basic function of the "arising out of" requirement—it preserves the essential distinction between general and specific jurisdiction. Under this test, a defendant cannot be haled into court for activities unrelated to the cause of action in the absence of a showing of substantial and continuous contacts sufficient to establish general jurisdiction. *See e.g., Scott v. Breeland*, 792 F.2d 925, 928 (9th Cir. 1986) (an assault on a flight attendant occurring in a plane on the ground in Reno does not arise out of a defendant's musical performances or sales of records or tapes in California); *Thos. P. Gonzalez Corp. v. Consejo Nactional de Produccion de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980) (visits to California by a defendant's representatives to execute formal documents in prior transactions do not support the exercise of jurisdiction over a cause of action relating to subsequent, unrelated transactions). The "but for" test preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum.

A restrictive reading of the "arising out of" requirement is not necessary in order to protect potential defendants from unreasonable assertions of jurisdiction. The third prong of the *Data Disc* test provides that protection. If the connection between the defendant's forum related activities is "too attenuated," the exercise of jurisdiction would be unreasonable, and therefore in violation of due process.

Finally, we note that adoption of the more restrictive view of the "arising out of" requirement would preclude the exercise of jurisdiction in some cases where the plaintiff has established purposeful availment through continuing efforts to solicit business, some nexus between the cause of action and the defendant's forum-related activities, and the reasonableness of requiring the defendant to defend in the forum. Such an approach would represent an unwarranted departure from the core concepts of

"fair play and substantial justice" which are central to due process analysis in the context of the exercise of personal jurisdiction.

Applying the *Cubbage standard*, we conclude that the Shutes' cause of action arose out of Carnival's contacts with Washington. The evidence is clear that Carnival's solicitation of business in Washington attracted the Shutes (through their travel agent) to the Carnival cruise. In the absence of Carnival's activity, the Shutes would not have taken the cruise, and Mrs. Shute's injury would not have occurred. It was Carnival's forum-related activities that put the parties within "tortious striking distance" of one another.

3. *Reasonableness*

After the first two prongs of the *Data Disc* test have been met, the court still must determine whether the exercise of jurisdiction over Carnival would be reasonable. In determining reasonableness, this circuit examines seven factors: the extent of purposeful interjection; the burden on the defendant to defend the suit in the chosen forum; the extent of conflict with the sovereignty of the defendant's state; the forum state's interest in the dispute; the most efficient forum for judicial resolution of the dispute; the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and the existence of an alternative forum. *Federal Deposit Ins. Corp. v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1442 (9th Cir. 1987). The court must balance the seven factors to determine whether the exercise of jurisdiction would be reasonable. *Id.*

Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut that presumption, a defendant "must present a compelling case" that the exercise of jurisdiction would, in fact, be unreasonable. *Burger King*, 471

U.S. at 476; *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 790 (9th Cir. 1987).

Carnival does not attempt to rebut the reasonableness of the exercise of jurisdiction through an analysis of the seven factors. Rather, Carnival's main argument is that litigation in Washington was not reasonably foreseeable because the passenger contract required suit to be brought in Florida, and because the contract for the cruise and the cruise itself were "consummated" outside of Washington. The latter argument is the same one raised and rejected in analyzing the purposeful availment requirement. The former ignores the fact that Carnival, by its business solicitation activities, has injected itself into the forum. Carnival has provided no authority for the view that a forum selection clause can be used to defeat jurisdiction of another state where exercise of that jurisdiction would otherwise be reasonable. An analysis of the seven factors used by this circuit suggests that jurisdiction over Carnival is reasonable in this case.

Extent of Purposeful Interjection

This factor is closely tied to the issue of purposeful availment analyzed above. Recent cases indicate that this factor is no longer given any weight once it is shown that the defendant purposefully directed its activities toward the forum state. *Melcher*, 824 F.2d at 790.

Burden on the Defendant

Although the defendant would prefer to litigate in Florida, in light of modern advances in transportation and communications, the burden of defending this suit in Washington would not be overwhelming. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986). Moreover, this court must "examine the burden on the defendant in light of the corresponding burden on the plaintiff." *Sinatra*, 854 F.2d at 1199; *Brand*, 796 F.2d

at 1075. It would be at least as burdensome for the Shutes to pursue this action in Florida as it would for Carnival to defend it in Washington.

This circuit recognizes that once minimum contacts have been established, inconvenience to the defendant is more appropriately handled not as a challenge to jurisdiction, but as a factor supporting a change in venue. *Sinatra*, 854 F.2d at 1199; *Hirsch*, 800 F.2d at 1481. Any inconvenience suffered by Carnival surely would not be so great as to constitute a deprivation of due process. *See e.g., Sinatra*, 854 F.2d at 1199 (inconvenience to Swiss Clinic with one representative in the U.S. of defending lawsuit in California not so great as to constitute due process violation). Thus, this factor does not strongly favor dismissal.

Conflict With Sovereignty of Defendant's State

This factor is not dispositive here. The Supreme Court has noted that litigation against an alien defendant creates a higher jurisdictional barrier due to additional sovereignty concerns. *Asahi*, 480 U.S. at 115. However, despite the fact that Carnival is a Panamanian corporation, its principal place of business is in Florida. It asserts that Florida is the proper forum for this dispute. Therefore it is the possible conflict with Florida's sovereignty which is of concern here. In this type of situation, this circuit has stated that choice-of-law rules, rather than jurisdictional rules, are more appropriate to accommodate conflicting sovereignty interests. *Hirsch*, 800 F.2d at 1482.

Forum State's Interest in Adjudicating the Dispute

A state is deemed to have a strong interest in protecting its citizens against the tortious acts of others. *Cubbage*, 744 F.2d at 671. This interest continues even where the injury occurs outside the forum state's territorial limits. *Id.* (California has a manifest interest in

protecting its citizens from tortious injury from health care providers who solicit patients from the state).

Efficient Judicial Resolution

This factor appears to favor the exercise of jurisdiction. Although the injury occurred in international waters off the coast of Mexico, the Shutes, their health care provider, and at least one of the witnesses to the accident all reside in Washington. At least one other witness resides in California, and it is unclear where other possible witnesses reside. As between Washington and Florida, the two states which are capable of exercising jurisdiction, Washington is the more efficient forum.

Convenience and Effectiveness of Relief for Plaintiff

The record indicates that the physical and financial burdens placed upon the Shutes by being forced to pursue this suit in Florida would be substantial. Dismissal of this suit from Washington effectively may prevent the Shutes from obtaining relief. This factor weighs heavily in favor of the exercise of jurisdiction. *Hirsch*, 800 F.2d at 1481.

Existence of an Alternative Forum

Carnival suggests that Florida is an available alternative forum, and the Shutes do not dispute this. However, in light of the practical difficulites noted in the discussions of efficient forum and convenience to plaintiffs, this factor cannot be said to weigh heavily in favor of dismissal.

We conclude that, on balance, these factors favor the exercise of jurisdiction. Certainly, Carnival has not presented a compelling case that the exercise of jurisdiction would be unreasonable. We therefore find that the Shutes have established personal jurisdiction over Carnival in Washington.

III. *The Effect of the Forum Selection Clause*

Carnival contends that even if it is subject to personal jurisdiction in Washington, the district court was required under 28 U.S.C. § 1406(a) to dismiss this action, or to transfer this action to a court located in Florida pursuant to the forum selection provision of the passenger ticket contract.[8] The Shutes argue that the forum selection provision is unreasonable, and should not be enforced in this case. Because of the parties' disparity in bargaining power and the impact of enforcing the forum selection provision on the Shutes' ability to pursue their case on the merits, we find that application of the forum selection provision would be unreasonable in this case.

Federal law governs the validity of the forum selection clause. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, No. 87-1988, slip op. at 12141 (9th Cir. Sept. 28, 1988). Thus, the starting point for analysis is the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).[9] *The Bremen* dealt with a contract

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[8] Although the district court did not reach this issue, both parties request that, in the interest of judicial economy, this court determine the applicability of the forum selection provision on appeal, rather than remanding to the district court. Because some of the factual issues are similar to those raised in the jurisdiction context, and because the record is sufficiently well-developed, we can decide the forum selection issue efficiently.

[9] In *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988) the Court held that the enforceability of a forum selection clause is only one of the factors to consider in making a 28 U.S.C. § 1404 transfer decision. '[T]he immediate issue before the district court was whether to grant respondent's motion to transfer the action under § 1404(a).' 108 S. Ct. at 2243. Carnival made no such motion in this case. Rather, Carnival argued solely on the basis of its forum selection clause that venue was improper, and that the case should therefore be dismissed or transferred pursuant to 28 U.S.C. § 1406(a). As this circuit noted in *Manetti-Farrow*, *Stewart* is inapplicable to such motions, and the analysis of *The Bremen* is controlling. 858 F.2d at 512-12 n.2.

between an American corporation, Zapata, and a German corporation, Unterweser, for Unterweser to tow a Zapata oil rig from Louisiana to a point in the Adriatic Sea off Ravenna, Italy. The contract provided that any dispute arising from the contract be brought before the London Court of Justice. The rig was damaged while in the Gulf of Mexico, and Zapata brought suit in a federal district court in Florida. The Fifth Circuit affirmed the district court's denial of Unterweser's motion to dismiss, but the Supreme Court reversed.

The Court held that forum selection clauses are *prima facie* valid. 407 U.S. at 10; *see also Manetti-Farrow*, slip op. at 12144. Such a clause should not be set aside unless the party challenging it can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *The Bremen*, 407 U.S. at 15. *See also Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984) (absent some evidence submitted by the party opposing enforcement of the clause indicating fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the expressed intent of the parties). However, *The Bremen* involved a large, complex commercial contract between two sophisticated parties. There was no evidence in *The Bremen* that the parties were in an unequal bargaining position. 407 U.S. at 12-13, and n.14 ("this was not simply a form contract with boilerplate language that Zapata had no power to alter").

Although some courts have upheld analogous provisions contained in passenger ticket contracts,[10] in our view the

[10] For example, in *Carpenter v. Klosters Rederi A/S*, 604 F.2d 111 (5th Cir. 1979), the Fifth Circuit upheld a contractual time limitation for initiating suit that was included in a passenger contract ticket. The court focused entirely upon whether the passenger

evidence in this case suggests the sort of disparity in bargaining power that justifies setting aside the forum selection provision. First, there is no evidence that the provision was freely bargained for. To the contrary, the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis. *See Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir. 1984) (applying Oregon law, the court found that a take-it-or-leave-it clause in a form contract is the type of unfair or unreasonable clause that should be invalidated); *Yoder v. Heinhold Commodities, Inc.*, 630 F.Supp. 756, 759 (E.D. Va. 1986) (inequality of bargaining power and use of form contracts are important factors in determining whether to enforce a forum selection clause); *Galli v. Travelhost, Inc.*, 603 F.Supp. 1260, 1263 (D. Nev. 1985) (court refused to enforce forum selection clause where evidence indicated that the clause was not freely bargained for). Even if we assume that the Shutes had notice of the provision,[11] there is nothing in the record to suggest that the Shutes could have bargained over this language. Because this provision was not freely bargained for, we hold that it does not represent the express intent of the parties, and should not receive the deference generally accorded to such provisions.[12]

received adequate notice. The court did not address whether application of the time limitation was reasonable.

[11] This itself is doubtful, as the Shutes apparently did not have an opportunity to review the terms and conditions printed on the ticket until after the ticket was printed in Florida and mailed to them in Washington. Thus, the transaction was completed before the Shutes ever saw the ticket's terms and conditions.

[12] Plaintiff also suggested that enforcement of the forum selection clause was barred by 46 U.S.C. § 183(c), which provides that it is unlawful for vessel owners "to insert in any . . . contract, or agreement any provision or limitation . . . purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by a court of competent jurisdiction on the question of liability for such loss

The fact that enforcement of the clause in this case would "be so gravely difficult and inconvenient" that the plaintiffs would "for all practical purposes be deprived of [their] day in court," *The Bremen*, 407 U.S. at 18, provides an independent justification for refusal to enforce the forum selection clause. *See Yoder*, 630 F.Supp. at 759; *Carefree Vacations, Inc. v. Brunner*, 615 F.Supp. 211, 214 (W.D. Tenn. 1985) (inconvenience and lack of relationship between chosen forum and transaction in dispute sufficient to establish that forum selection clause is unreasonable). As we noted in analyzing the reasonableness of subjecting Carnival to suit in Washington, enforcement of the forum selection clause would be greatly inconvenient to the plaintiffs and witnesses. There is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida. We therefore decline to hold that the forum selection clause requires that this action be dismissed or transferred pursuant to 28 U.S.C. § 1406(a).

IV. *Conclusion*

We find that exercise of jurisdiction in Washington to be consistent with principles of due process. We also find the forum selection clause requiring suit to be brought in Florida to be unenforceable in these circumstances. This case is therefore REVERSED and REMANDED.

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or injury, or the measure of damages therefor. All such agreements . . . shall be null and void and of no effect." Because we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of this statute on forum selection agreements. We do note, however, that this statute exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners, and the need for independent examination of the fairness of this type of contract.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4063

D.C. No. CIV-86-1204-D

EULALA SHUTE, and RUSSEL SHUTE,
Plaintiffs-Appellants,

v.

CARNIVAL CRUISE LINES,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
October 5, 1988—San Francisco, California

Filed December 12, 1988

Before: Betty B. Fletcher, Robert Boochever and
Stephen S. Trott, Circuit Judges

Opinion by Judge Fletcher

OPINION

Gregory J. Wall, Brousseau, Wall & Jankovich, Seattle, Washington, for the plaintiffs-appellants.

Jonathan Rodriguez-Atkatz, Bogle & Gates, Seattle, Washington, for the defendant-appellee.

FLETCHER, Circuit Judge:

Plaintiffs Eulala and Russell Shute appeal the district court's decision to grant the defendant's motion for summary judgment, dismissing their suit for damages. The district court granted the motion on the grounds that the defendant's forum-related activities were insufficient to support the exercise of personal jurisdiction in a manner consistent with due process. We reverse.

BACKGROUND

The defendant-appellee, Carnival Cruise Lines, is a Panamanian corporation with its principal place of business in Miami, Florida. It is undisputed that Carnival is not registered to do business in the State of Washington. It owns no property in Washington, maintains no office or bank account in Washington and pays no business taxes in Washington. It has never operated ships which have called at Washington ports. It has no exclusive agent in Washington. Carnival does, however, advertise its cruises in local Washington newspapers. It also provides brochures to travel agents in Washington, which in turn are distributed to potential customers. Carnival also periodically holds seminars for travel agents in the State of Washington to inform them about, and encourage them to sell, Carnival cruises. Carnival pays travel agencies a 10% commission on proceeds from tickets sold for Carnival cruises.

The plaintiff-appellants, who are Washington residents, purchased tickets through Smokey Point Travel in Arlington, Washington for a seven day cruise on a Carnival Cruise Lines ship, the TROPICALE. The appellants were to embark in Los Angeles, California, sailing from there to Puerto Vallarta, Mexico. The tickets were purchased through the travel agent, who forwarded payment to Carnival in Miami. The tickets were issued in Florida, then forwarded to the appellants in Washington.

The passage contract ticket contained a forum selection clause that provided as follows:

> It is agreed by and between the passengers and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.

The appellants' cause of action arises from injuries suffered by Mrs. Shute when she slipped on a deck mat while on a guided tour of the ship's galley. This incident occurred in international waters off the coast of Mexico. The Shutes allege that the fall was due to the negligence of Carnival and its employees, and request damages arising out of personal injuries to Mrs. Shute.

Carnival moved for summary judgment on two grounds: first, that the district court lacked personal jurisdiction over Carnival; and second, that the passenger ticket contract required the Shutes to bring all claims against Carnival in the Florida courts. In the alternative, Carnival requested a transfer of the case to the U.S. District Court for the Southern District of Florida. The court addressed only the first issue, ruling that it lacked personal jurisdiction over Carnival. The Shutes timely appeal.

DISCUSSION

I. *Burden of Proof/Standard of Review*

The plaintiff has the burden of establishing that the court has personal jurisdiction. *Cubbage v. Merchent*,

744 F.2d 665, 667 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). Where the trial court's ruling is based solely upon a review of affidavits and discovery materials, dismissal is appropriate only if the plaintiff fails to make a *prima facie* showing of personal jurisdiction. *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986); *Data Disc, Inc. v. Systems Tech. Assoc.*, 557 F.2d 1280, 1285-86 (9th Cir. 1977). *Cf. Haisten v. Grass Valley Med. Reimbursement Fund*, 784 F.2d 1392, 1396, n.1 (9th Cir. 1986) (where defendant challenges judgment entered against it on the merits, the plaintiff bears the full burden of proof of personal jurisdiction by the preponderance of the evidence).

A district court's determination that personal jurisdiction can properly be exercised is a question of law reviewable *de novo* when the underlying facts are undisputed. *Haisten*, 784 F.2d at 1396. For the purposes of this appeal, we treat the plaintiffs' allegations as correct. *Fields*, 796 F.2d at 301.

II. *Personal Jurisdiction*

This action was brought in admiralty in the U.S. District Court for the Western District of Washington. In order to establish personal jurisdiction, the Shutes must demonstrate that the forum state's jurisdictional statute confers personal jurisdiction, and that the exercise of jurisdiction accords with federal constitutional principles of due process. *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985).

Washington's jurisdictional statute provides, in relevant part, as follows:

> (1) Any person whether or not a citizen or resident of this state, who, in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of said acts: (a) the transaction of any business within the state . . . .

Wash. Rev. Code 4.28.185. (West 1988). This statute has been construed by the Supreme Court of Washington to permit the assertion of jurisdiction to the extent permitted by due process, except where limited by the terms of the statute. *Deutsch v. West Coast Machinery Co.*, 80 Wash.2d 707, 497 P.2d 1311 (1972). For our purposes, "the statutory and constitutional standards merge into a single due process test." *Pedersen Fisheries, Inc. v. Patti Industries*, 563 F.Supp. 72, 74 (W.D. Wash. 1983).[1]

Considerations of due process require that non-resident defendants have certain minimum contacts with the forum state, so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). However, the nature and quality of the necessary contacts required vary, depending upon the type of jurisdiction asserted.

Courts may exercise either general or specific jurisdiction over non-resident defendants. General jurisdiction exists where the non-resident defendant has " 'substantial' or 'continuous and systematic' contacts with the forum state." *Fields*, 796 F.2d at 301 (quoting *Haisten*, 784 F.2d at 1396). A court exercising general jurisdiction over a defendant may hear cases unrelated to the defendant's forum-related activities. *Id.*

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[1] Where jurisdiction is asserted under § 4.28.185(1)(a), the "transaction of any business" provision, the Washington courts apply a three factor test that is virtually identical to the specific jurisdiction due process test employed by this circuit. *Compare Deutsch*, 497 P.2d at 1314 *with Haisten*, 784 F.2d at 1397. We therefore conclude that the Washington long-arm statute imposes no limitation beyond those imposed by due process.

The level of contact with the forum state necessary to establish general jurisdiction is quite high. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984) (no jurisdiction over foreign corporation that sent officers to forum for a negotiating session, accepted checks drawn from a forum bank, purchased equipment from the forum, and sent personnel to the forum to be trained); *Cubbage*, 744 F.2d at 667-68 (no general jurisdiction over non-resident doctors despite significant number of patients in forum, use of forum's state medical insurance system and telephone directory listing that reached forum); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (no general jurisdiction over defendants despite several visits and purchases in forum, solicitation of contract in forum which included choice of law provision favoring forum, and extensive communication with forum), *cert. denied*, 471 U.S. 1066 (1985); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242-43 (9th Cir. 1984) (foreign corporation's sales and marketing efforts in forum state, including solicitation of orders, promotion of products to potential customers through the mail and through showroom displays, and attendance at trade shows and sales meetings, were insufficient contact to assert general jurisdiction).

Carnival's contacts with the State of Washington are insufficient to support an exercise of general jurisdiction. Carnival has no offices and no exclusive agents in Washington, it is not registered to do business there, and it pays no taxes there. These factors militate against the exercise of general jurisdiction. *See Fields*, 796 F.2d at 302. Its contacts are limited to advertising in the local media, the mailing of brochures and the payment of commissions to travel agents, the conducting of promotional seminars, and the sale of its vacation cruises to residents of Washington. Only 1.29% and 1.06% of Carnival's cruise business was derived from residents of Washington in 1985 and 1986, respectively. This court has held

under somewhat similar facts that the exercise of general jurisdiction would violate due process. *See Congoleum*, 729 F.2d at 1243.

If the non-resident defendant's activities within the forum are not sufficiently pervasive to justify the exercise of general jurisdiction, a court may nevertheless assert jurisdiction for a cause of action arising out of the defendant's activities within the forum. The Ninth Circuit has devised a three-part test to determine whether the exercise of this "specific" jurisdiction comports with due process: (1) The defendant must have done some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Haisten*, 784 F.2d at 1397; *Data Disc*, 557 F.2d at 1287.

1. *Purposeful Availment*

Purposeful availment requires that the defendant engage in some form of affirmative conduct allowing or promoting the transaction of business within the forum state. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 840 (9th Cir. 1986). This focus upon the affirmative conduct of the defendant is designed to ensure that the defendant is not hailed into court as a result of random, fortuitous or attenuated contacts, or on account of the unilateral activities of third parties. *See e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (purchaser's unilateral act of bringing defendant's product into the forum state provides an insufficient basis for the exercise of personal jurisdiction over the defendant).

This circuit has held that a non-resident defendant's act of soliciting business in the forum state will gerally be considered purposeful availment if that solici-

tation results in contract negotiations or the transaction of business. *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988); *Decker Coal*, 805 F.2d at 840 ("if the defendant directly solicits business in the forum state, the resulting transactions will probably constitute the deliberate transaction of business invoking the benefits of the forum state's laws").

In *Sinatra*, the plaintiff filed suit in California against Clinic La Prairie, a Swiss health clinic, for misappropriation of his name and likeness. The *National Enquirer* had done a full feature on the Clinic in exchange for Clinic officials' agreement to make false statements regarding Frank Sinatra's alleged stay at the Clinic. Sinatra had never visited the Clinic. The court ruled that the Clinic's advertisements in the forum state, coupled with its misappropriation of Sinatra's name through the *Enquirer* article, were sufficiently directed toward the forum to satisfy the purposeful availment prong of the *Delta Disc* test. 854 F.2d at 1195-98.

The *Sinatra* court's premise that solicitation of business in the forum state will support a finding of purposeful availment has substantial support in *Asahi Metal Indus. Co. v. Superior Court of Solano County*, 480 U.S. 102 (1987). Justice O'Connor, writing for a four-Justice plurality, noted that conduct such as "designing the product for the market in the forum State, establishing channels for providing regular advice to customers in the forum State, advertising in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State[,]" may evidence purposeful availment. 480 U.S. at 112. The plurality relied upon the absence of these factors to conclude that Asahi did not purposefully avail itself of the California market. *Id.*[2]

[2] Justice Brennan, writing for four members of the Court, maintained that the absence of "additional conduct" such as advertisement in the forum state was irrelevant. In his view, placing the goods in the stream of commerce with the knowledge that they will reach the forum state, when considered in light of the economic benefit received from sales in the forum, is sufficient to establish purposeful availment. 480 U.S. at 117, (Brennan, J., concurring). Under this standard, it is possible that Carnival's knowledge that ticket sales were being made to Washington residents is, in itself, sufficient to establish that Carnival purposefully availed itself of the benefits and protections of Washington law. We need not reach that question, however, because Carnival engaged in three of the four types of conduct mentioned by O'Connor. We view these actions to be sufficient to meet the purposeful availment test.

In light of these cases, it is difficult to conclude that Carnival did not purposefully avail itself of the laws of Washington. It advertised in the local media, promoted its cruises through brochures sent to travel agents in that state, and paid a commission on sales of cruises in that state. In addition, Carnival conducted promotional seminars in Washington designed to increase its sales to residents of that state. Carnival's efforts to solicit business in Washington were more extensive than those of the defendant Clinic in *Sinatra*, which consisted of advertisements in a few periodicals circulated in California. *Sinatra*, 854 F.2d at 1196.[3]

Carnival maintains that the fact it has never "consummated" a transaction in Washington precludes a finding of purposeful availment. In Carnival's view, the fact that the ticket is issued in Florida after receipt of payment and the fact that the cruise takes place completely outside of Washington State are decisive. This misses the point. As the Supreme Court has explained, the reality of modern commercial life is that many transactions take place solely by mail or wire across state lines, obviating the need for physical presence in the

[3] It should be noted, however, that in analyzing whether the defendant Clinic had directed its activities toward California, the court also considered the effects in the forum of the defendant's acts. Thus, the fact that California was the situs of the tortious injury was a factor which led the court to find purposeful availment. 854 F.2d at 1196-98. That factor is not present in this case.

state toward which the defendant's activities are directed. Thus, the Court has held that the physical absence of the defendant and the transaction from the forum cannot defeat the exercise of personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *see also Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 907 (6th Cir. 1988), *cert. denied* 57 U.S.L.W. 3313 (U.S. Nov. 1, 1988) (No. 88-403) ("Neither the presence of the defendant in the state, nor actual contract formation need take place in the forum state for defendant to do business in that state.").

The actions taken by Carnival to solicit business within the State of Washington were clearly purposefully directed toward residents of Washington. To that extent, it is irrelevant where the tickets are issued or where the cruise takes place. In addition, Carnival's argument ignores the fact that the promotional seminars actually took place within the state. In short, Carnival's actions were more than sufficient to meet the purposeful availment test.

2. *Arising Out Of*

The second prong of the three-part *Data Disc* test requires that the claim must "arise out of" the defendant's forum-related activities. Carnival maintains that the Shutes' claim, which is based on allegations of negligence with respect to conditions on the TROPICALE, does not "arise out of" Carnival's business solicitation contacts with Washington.

Carnival points to several cases outside this circuit supporting its contention that, for purposes of personal jurisdiction, "slip and fall" claims do not arise out of the defendant's business solicitation activities in the forum. *See Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983). *See also Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d

Cir. 1964) (plaintiff's injuries sustained while on defendant's bus tour did not arise from defendant's forum activities, where those activities consisted of ticket sale through independent travel agent in the forum).

In *Marino* the plaintiff, a resident of Massachusetts, sued Hyatt, a Delaware corporation with its principal place of business in Illinois, for injuries incurred at one of the defendant's hotels. The plaintiff had made reservations through a Massachusetts travel agent to stay at the defendant's Hyatt Regency Hotel in Maui, Hawaii. The plaintiff slipped in the bathtub of her Hawaii hotel room, sustaining injuries. The court of appeals affirmed the district court's dismissal of her ensuing personal injury claim for lack of personal jurisdiction.

Basing its decision on an interpretation of the Massachusettss long-arm statute, the court acknowledged that Hyatt transacted business in Massachusetts. However, the court concluded that the claim, stemming from Mrs. Marino's fall in the bathtub in Hawaii, did not "arise from" the reservation contract entered into in Massachusetts. 793 F.2d at 430.[4]

In *Pearrow* the plaintiff, an Arkansas resident, slipped and fell on the floor of the Hospitality Suite at Opryland USA in Nashville, Tennessee. He brought an action in Arkansas against the owner of Opryland, National Life. The district court dismissed the case for lack of jurisdiction, noting that the cause of action did not arise out of the defendant's activities in Arkansas, and that the Arkansas long-arm statute therefore provided no basis for the exercise of jurisdiction. The court of appeals affirmed.

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[4] The court distinguished *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983) (a cause of action for breach of contract arose from law school's act of sending recruiters to Massachusetts). In the court's view, a cause of action for breach of contract was distinguishable from a cause of action alleging a negligent tort.

Noting that National was registered to conduct insurance business in Arkansas, the court concluded that the plaintiff's Tennessee injury had nothing to do with that insurance business. More important, the court concluded that National's act of sending brochures into Arkansas soliciting visits to Opryland was "too tenuous" a connection to support jurisdiction. 703 F.2d at 1069.

Were this court to apply the "arising from" analysis of *Marino* and *Pearrow* to this case, we would conclude that Mrs. Shute's fall did not arise out of Carnival's solicitation of business in Washington. Rather, we would find that her injuries arose out of the negligent failure to maintain a safe passageway through the galley of the TROPICALE. However, *Cubbage v. Merchent*, 744 F.2d 665, suggests that this circuit has not adopted such a stringent standard of causation in evaluating whether a court has specific jurisdiction.

In *Cubbage*, this court was faced with a medical malpractice suit brought in a federal district court in California by a California resident against two doctors and a hospital located in and licensed in Arizona. Although the doctors were not licensed to practice in California, they applied for and were issued California Medi-Cal numbers. Both doctors and the hospital were listed in a telephone directory which was distributed in the area of California lying adjacent to Arizona, and a significant number of the defendants' patients (including Cubbage) were California residents.

Applying the *Data Disc* test, the court held that the exercise of specific jurisdiction did not offend due process. Of particular relevance is the court's holding that the appellant's malpractice claim arose out of the defendant's solicitation of patients from California, 744 F.2d at 670. Had the *Cubbage* court applied reasoning similar to that utilized in the cases cited by Carnival, Cubbage's claim would have arisen out of the doctor's negligent treatment

of Cubbage in Arizona, not out of the business solicitation activities in California. In our view, *Cubbage* must be read as a rejection by this circuit of the rigid causation standard advanced by Carnival.

Decisions by at least two other courts of appeal support the view that a tort can arise from prior business solicitation in the forum state. *Lanier v. American Bd. of Endodontics*, 843 F.2d 901; *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981). These courts apply a "but for" test of causality in this type of situation.

Lanier involved allegations of sex discrimination in the certification procedure employed by the defendant Board. The plaintiff, a licensed Michigan dentist, sought certification by the defendant through its Chicago, Illinois headquarters. Dr. Lanier twice failed the oral examination required for certification, once in Phoenix, once in Chicago. She then filed suit in Michigan. The district court ruled that it lacked personal jurisdiction over the defendant, but the appellate court reversed.

The Sixth Circuit court first determined that the Board's contacts with the State of Michigan, which consisted of the collection of application fees from Dr. Lanier, together with a series of telephone calls and written correspondence to Dr. Lanier in Michigan, were sufficient to constitute "the transaction of any business" within the meaning of the long-arm statute. The court then considered whether the "arising out of" requirement of the long-arm statute was fulfilled. The Board argued that the plaintiff's cause of action arose from the allegedly unfairly evaluated oral examinations given in *Arizona* and Illinois rather than from its contacts with Dr. Lanier in Michigan. The court rejected this argument, commenting that it was "unpersuaded that the plaintiff's relationship and contacts with the defendant Board can be logically or legally fragmented in that fashion." 843 F.2d at 908.

In the court's view, the entire course of events underlying Dr. Lanier's claim was an uninterrupted whole which began with, and was uniquely made possible by, the Board's contacts in Michigan. But for those contacts, the cause of action would never have come about.

> Whether the decision to discriminate occurred before, during, or after the oral examination administered to the plaintiff is not controlling . . . [I]t arose from, was occasioned by, and would not have occurred but for the totality of Dr. Lanier's efforts to obtain Board certification—efforts which derived, as we have held, from the defendant's limited business contacts with Dr. Lanier in Michigan.

843 F.2d at 908-09.

The Fifth Circuit expressed similar sentiments in *Prejean*. In that case, survivors of employees allegedly under contract with Sonatrach, the Algerian national oil company, brought a wrongful death action in Texas against Sonatrach, Air Algeria and Beech Aircraft Corporation. The plaintiffs alleged that their spouses, while in Algeria performing duties pursuant to a contract with Sonatrach, died when a plane chartered by Sonatrach crashed.

Applying the Texas jurisdictional statute, the district court dismissed the action as to all three defendants for want of personal jurisdiction. The court of appeals affirmed as to Air Algeria and Beech, but reversed and remanded for further discovery as to jurisdiction over Sonatrach.[5]

The key analysis for our purposes appears in footnote 21, where the court addressed Sonatrach's argument that the existence of the contract with the decedents' firm

[5] The defendant disputed the existence of the only contact to the forum, the alleged contract between Sonatrach and the decedents' Dallas engineering firm. Thus, the court required more information about the possible existence of that contract.

would be insufficient to satisfy the "arising from" requirement of the jurisdictional statute. Sonatrach argued that a tort suit cannot arise from a contractual contact with the forum. The court responded with the following observation:

> Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a "but for" causative factor for the tort since it brought the parties within tortious "striking distance" of one another. While the relationship between a tort suit and a contractual contact is certainly more tenuous than when a tort suit arises from a tort contact, that only goes to whether the contact is by itself sufficient for due process, not whether the suit arises from the contact.

652 F.2d at 1270, n. 21.

Our circuit, in *Cubbage v. Merchent*, implicitly adopted the "but for" test in analyzing whether a cause of action arises from a defendant's forum related activities. Today, we make its adoption explicit. We agree with the Fifth and Sixth Circuits that the proximate cause approach of *Marino* and *Pearrow* unnecessarily limits the ordinary meaning of the "arising out of" language. Moreover, application of a "but for" standard is more consistent with cases finding jurisdiction over manufacturers of defective goods sent into a forum state. *See e.g., Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355, 1358 (9th Cir. 1983) (Oregon longshoreman's negligence claim against Japanese manufacturer of defective wire-rope splice held to arise from delivery of the splices into commerce). In contrast, application of the *Marino* standard would compel the conclusion that such claims arise from negligence in manufacture and design, rather than from forum-related activity.

The "but for" test is consistent with the basic function of the "arising out of" requirement—it preserves

the essential distinction between general and specific jurisdiction. Under this test, a defendant cannot be hailed into court for activities unrelated to the cause of action in the absence of a showing of substantial and continuous contacts sufficient to establish general jurisdiction. *See e.g., Scott v. Breeland*, 792 F.2d 925, 928 (9th Cir. 1986) (an assault on a flight attendant occurring in a plane on the ground in Reno does not arise out of a defendant's musical performances or sales of records or tapes in California); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980) (visits to California by a defendant's representatives to execute formal documents in prior transactions do not support the exercise of jurisdiction over a cause of action relating to subsequent, unrelated transactions). The "but for" test preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum.

A restrictive reading of the "arising out of" requirement is not necessary in order to protect potential defendants from unreasonable assertions of jurisdiction. The third prong of the *Data Disc* test provides that protection. If the connection between the defendant's forum related activities is "too attenuated," the exercise of jurisdiction would be unreasonable, and therefore in violation of due process.

Finally, we note that adoption of the more restrictive view of the "arising out of" requirement would preclude the exercise of jurisdiction in some cases where the plaintiff has established purposeful availment, some nexus between the cause of action and the defendant's forum-related activities, and the reasonableness of requiring the defendant to defend in the forum. Such an approach would represent an unwarranted departure from the core concepts of "fair play and substantial justice" which are central to due process analysis in the context of the exercise of personal jurisdiction.

Applying the *Cubbage* standard, we conclude that the Shutes' cause of action arose out of Carnival's contacts with Washington. The evidence is clear that Carnival's solicitation of business in Washington attracted the Shutes (through their travel agent) to the Carnival cruise. In the absence of Carnival's activity, the Shutes would not have taken the cruise, and Mrs. Shute's injury would not have occurred. It was Carnival's forum-related activities that put the parties within "tortious striking distance" of one another.

3. *Reasonableness*

After the first two prongs of the *Data Disc* test have been met, the court still must determine whether the exercise of jurisdiction over Carnival would be reasonable. In determining reasonableness, this circuit examines seven factors: the extent of purposeful interjection; the burden on the defendant to defend the suit in the chosen forum; the extent of conflict with the sovereignty of the defendant's state; the forum state's interest in the dispute; the most efficient forum for judicial resolution of the dispute; the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and the existence of an alternative forum. *Federal Deposit Ins. Corp. v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1442 (9th Cir. 1987) The court must balance the seven factors to determine whether the exercise of jurisdiction would be reasonable. *Id.*

Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut that presumption, a defendant "must present a compelling case" that the exercise of jurisdiction would, in fact, be unreasonable. *Burger King*, 471 U.S. at 476; *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 790 (9th Cir. 1987).

Carnival does not attempt to rebut the reasonableness of the exercise of jurisdiction through an analysis of the

seven factors. Rather, Carnival's main argument is that litigation in Washington was not reasonably foreseeable because the passenger contract required suit to be brought in Florida, and because the contract for the cruise and the cruise itself were "consummated" outside of Washington. The latter argument is the same one raised and rejected in analyzing the purposeful availment requirement. The former ignores the fact that Carnival, by its business solicitation activities, has injected itself into the forum. Carnival has provided no authority for the view that a forum selection clause can be used to defeat jurisdiction of another state where exercise of that jurisdiction would otherwise be reasonable. An analysis of the seven factors used by this circuit suggests that jurisdiction over Carnival is reasonable in this case.

Extent of Purposeful Interjection

This factor is closely tied to the issue of purposeful availment analyzed above. Recent cases indicate that this factor is no longer given any weight once it is shown that the defendant purposefully directed its activities toward the forum state. *Melcher*, 824 F.2d at 790.

Burden on the Defendant

Although the defendant would prefer to litigate in Florida, in light of modern advances in transportation and communications, the burden of defending this suit in Washington would not be overwhelming. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986). Moreover, this court must "examine the burden on the defendant in light of the corresponding burden on the plaintiff." *Sinatra*, 854 F.2d at 1199; *Brand*, 796 F.2d at 1075. It would be at least as burdensome for the Shutes to pursue this action in Florida as it would for Carnival to defend it in Washington.

This circuit recognizes that once minimum contacts have been established, inconvenience to the defendant is

more appropriately handled not as a challenge to jurisdiction, but as a factor supporting a change in venue. *Sinatra*, 854 F.2d at 1199; *Hirsch*, 800 F.2d at 1481. Any inconvenience suffered by Carnival surely would not be so great as to constitute a deprivation of due process. *See e.g., Sinatra*, 854 F.2d at 1199 (inconvenience to Swiss Clinic with one representative in the U.S. of defending lawsuit in California not so great as to constitute due process violation). Thus, this factor does not strongly favor dismissal.

Conflict With Sovereignty of Defendant's State

This factor is not dispositive here. The Supreme Court has noted that litigation against an alien defendant creates a higher jurisdictional barrier due to additional sovereignty concerns. *Asahi*, 480 U.S. at 115. However, despite the fact that Carnival is a Panamanian corporation, its principal place of business is in Florida. It asserts that Florida is the proper forum for this dispute. Therefore it is the possible conflict with Florida's sovereignty which is of concern here. In this type of situation, this circuit has stated that choice-of-law rules, rather than jurisdictional rules, are more appropriate to accommodate conflicting sovereignty interests. *Hirsch*, 800 F.2d at 1482.

Forum State's Interest in Adjudicating the Dispute

A state is deemed to have a strong interest in protecting its citizens against the tortious acts of others. *Cubbage*, 744 F.2d at 671. This interest continues even where the injury occurs outside the forum state's territorial limits. *Id.* (California has a manifest interest in protecting its citizens from tortious injury from health care providers who solicit patients from the state).

Efficient Judicial Resolution

This factor appears to favor the exercise of jurisdiction. Although the injury occurred in international

waters off the coast of Mexico, the Shutes, their health care provider, and at least one of the witnesses to the accident all reside in Washington. At least one other witness resides in California, and it is unclear where other possible witnesses reside. As between Washington and Forida, the two states which are capable of exercising jurisdiction, Washington is the more efficient forum.

Convenience and Effectiveness of Relief for Plaintiff

The record indicates that the physical and financial burdens placed upon the Shutes by being forced to pursue this suit in Florida would be substantial. Dismissal of this suit from Washington effectively may prevent the Shutes from obtaining relief. This factor weighs heavily in favor of the exercise of jurisdiction. *Hirsch*, 800 F.2d at 1481.

Existence of an Alternative Forum

Carnival suggests that Florida is an available alternative forum, and the Shutes do not dispute this. However, in light of the practical difficulties noted in the discussions of efficient forum and convenience to plaintiffs, this factor cannot be said to weigh heavily in favor of dismissal.

We conclude that, on balance, these factors favor the exercise of jurisdiction. Certainly, Carnival has not presented a compelling case that the exercise of jurisdiction would be unreasonable. We therefore find that the Shutes have established personal jurisdiction over Carnival in Washington.

III. *The Effect of the Forum Selection Clause*

Carnival contends that even if it is subject to personal jurisdiction in Washington, the district court was required to transfer this action to a court located in Florida pursuant to the forum selection provision of the pas-

senger ticket contract.[6] The Shutes argue that the forum selection provision is unreasonable, and should not be enforced in this case. Because of the parties' disparity in bargaining power and the impact of enforcing the forum selection provision on the Shutes' ability to pursue their case on the merits, we find that application of the forum selection provision would be unreasonable in this case.

Federal law governs the validity of the forum selection clause. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, No. 87-1988, slip op. at 12141 (9th Cir. Sept. 28, 1988). Thus, the starting point for analysis is the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *The Bremen* dealt with a contract between an American corporation, Zapata, and a German corporation, Unterweser, for Unterweser to tow a Zapata oil rig from Louisiana to a point in the Adriatic Sea off Ravenna, Italy. The contract provided that any dispute arising from the contract be brought before the London Court of Justice. The rig was damaged while in the Gulf of Mexico, and Zapata brought suit in a federal district court in Florida. The Fifth Circuit affirmed the district court's denial of Unterweser's motion to dismiss, but the Supreme Court reversed.

The Court held that forum selection clauses are *prima facie* valid. 407 U.S. at 10; *see also Manetti-Farrow* slip op. at 12144. Such a clause should not be set aside unless the party challenging it can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *The Bremen*, 407 U.S. at 15. *See also Pelle-*

[6] Although the district court did not reach this issue, both parties request that, in the interest of judicial economy, this court determine the applicability of the forum selection provision on appeal, rather than remanding to the district court. Because some of the factual issues are similar to those raised in the jurisdiction context, and because the record is sufficiently well-developed, we can decide the forum selection issue efficiently.

port Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 (9th Cir. 1984) (absent some evidence submitted by the party opposing enforcement of the clause indicating fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the expressed intent of the parties). However, *The Bremen* involved a large, complex commercial contract between two sophisticated parties. There was no evidence in *The Bremen* that the parties were in an unequal bargaining position. 407 U.S. at 12-13, and n.14 ("this was not simply a form contract with boilerplate language that Zapata had no power to alter").

Although some courts have upheld analogous provisions contained in passenger ticket contracts,[7] in our view the evidence in this case suggests the sort of disparity in bargaining power that justifies setting aside the forum selection provision. First, there is no evidence that the provision was freely bargained for. To the contrary, the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis. *See Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir. 1984) (applying Oregon law, the court found that a take-it-or-leave-it clause in a form contract is the type of unfair or unreasonable clause that should be invalidated); *Yoder v. Heinhold Commodities, Inc.*, 630 F.Supp. 756, 759 (E.D. Va. 1986) (inequality of bargaining power and use of form contracts are important factors in determining whether to enforce a forum selection clause); *Galli v. Travelhost, Inc.*, 603 F.Supp. 1260, 1263

[7] For example, in *Carpenter v. Klosters Rederi A/S*, 604 F.2d 11 (5th Cir. 1979), the Fifth Circuit upheld a contractual time limitation for initiating suit that was included in a passenger contract ticket. The court focused entirely upon whether the passenger received adequate notice. The court did not address whether application of the time limitation was reasonable.

(D. Nev. 1985) (court refused to enforce forum selection clause where evidence indicated that the clause was not freely bargained for). Even if we assume that the Shutes had notice of provision,[8] there is nothing in the record to suggest that the Shutes could have bargained over this language. Because this provision was not freely bargained for, we hold that it does not represent the expressed intent of the parties, and should not receive the deference generally accorded to such provisions.[9]

The fact that enforcement of the clause in this case would "be so gravely difficult and inconvenient" that the plaintiffs would "for all practical purposes be deprived of [their] day in court," *The Bremen*, 407 U.S. at 18, provides an independent justification for refusal to enforce the forum selection clause. *See Yoder*, 630 F.Supp. at 759; *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 214 (W.D. Tenn. 1985) (inconvenience and lack of relationship between chosen forum and transaction in dispute sufficient to establish that forum selection clause is unreasonable). As we noted in analyzing the reason-

[8] This itself is doubtful, as the Shutes apparently did not have an opportunity to review the terms and conditions printed on the ticket until after the ticket was printed in Florida and mailed to them in Washington. Thus, the transaction was completed before the Shutes ever saw the ticket's terms and conditions.

[9] Plaintiff also suggested that enforcement of the forum selection clause was barred by 46 U.S.C. § 183(c), which provides that it is unlawful for vessel owners "to insert in any . . . contract, or agreement any provision or limitation . . . purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by a court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such agreements . . . shall be null and void and of no effect." Because we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of this statute on forum selection agreements. We do note, however, that this statute exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners, and the need for independent examination of the fairess of this type of contract.

ableness of sujecting Carnival to suit in Washington, enforcement of the forum selection clause would be greatly inconvenient to the plaintiffs and witnesses. There is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida. We therefore decline to enforce the forum selection provision in this case.

IV. *Conclusion*

We find that exercise of jurisdiction in Washington to be consistent with principles of due process. We also find the forum selection clause requiring suit to be brought in Florida to be unenforceable in these circumstances. This case is therefore REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4063

D.C. No. CV-86-1204-D

EULALA SHUTE, and RUSSEL SHUTE,
Plaintiffs-Appellants,

v.

CARNIVAL CRUISE LINES,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington

Filed April 27, 1989

Before: Betty B. Fletcher, Robert Boochever and
Stephen S. Trott, Circuit Judges.

ORDER WITHDRAWING OPINION

The opinion in this case filed December 12, 1988 is withdrawn pending decision by the Supreme Court of Washington of a question certified to it.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Number 56089-7

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN

EULALA SHUTE and RUSSEL SHUTE,
Appellants,

v.

CARNIVAL CRUISE LINES,
Appellee.

En Banc

Filed Dec. 7, 1989

SMITH, J.—A Washington resident, injured on a cruise ship in international waters off the coast of Mexico, brought suit against the cruise operator, a Panamanian corporation with its principal place of business in Florida, under the Washington "long-arm" statute, RCW 4.28.185. The United States Court of Appeals for the Ninth Circuit certified to this court the question whether personal jurisdiction over the cruise ship operator exists under the statute. Unless limited by the terms of the statute, our courts may assert jurisdiction over nonresident defendants to the extent permitted by federal due process. We therefore answer the certified question "yes."

The sole question presented by this case is whether a claim for negligent injury occurring on an ocean cruise ship in international waters can be said, within the meaning of our state's long-arm statute, to "arise from" advertisement and promotion in Washington of its cruises by a foreign corporation.

Appellee Carnival Cruise Lines, Inc. (Carnival), is a Panamanian corporation with its principal place of business in Florida. Appellants Eulala and Russel Shute are Washington residents who purchased ocean cruise fares from Carnival through a Snohomish County travel agency in March 1986.

The cruise ship, the *M/V Tropicale*, embarked from Los Angeles, California, on April 13, 1986, en route to Mexico. On April 15, 1986, during a guided tour of the ship's galley, Mrs. Eulala Shute slipped, fell, and was injured. The ship was in international waters off the coast of Mexico at the time. The Shutes filed this case as an action in Admiralty in the United States District Court for the Western District of Washington.

The trial court, the Honorable Carolyn R. Dimmick, by order dated June 25, 1987, granted summary judgment in favor of Carnival, dismissing the claim because the cause of action did not "arise out of" or "result from" the defendant's contacts with the state of Washington.

In its opinion, issued December 12, 1988, the United States Court of Appeals for the Ninth Circuit reversed the District Court. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989). Carnival moved for reconsideration. While that motion was pending, on February 5, 1989, the Washington Court of Appeals, Division One, issued its opinion in *Banton v. Opryland U.S.A., Inc.*, 53 Wn. App. 409, 767 P.2d 584 (1989), interpreting the Washington long-arm statute and finding no jurisdiction on facts comparable

to those in the Shutes' case. The United States Court of Appeals then withdrew its opinion and, by order dated April 24, 1989, certified the following question to this court:

> Would the Washington long-arm statute establish personal jurisdiction over Carnival Cruise Lines for the claim asserted by the Shutes?

Carnival's only contacts with the State of Washington consist of advertisements in Washington newspapers, promotional materials provided to Washington travel agencies, and seminars conducted by Carnival's personnel for travel agencies in promotion of its cruises. Carnival maintains no office, owns no real estate in the state of Washington, and has no Washington business license.

The tickets issued by Carnival contained contract clauses designating Florida as the forum for any litigation. They were issued in Florida and forwarded to Washington. Carnival provided neither transportation nor services to the Shutes before they boarded the *M/V Tropicale* in Los Angeles. There is no indication that the *M/V Tropicale* nor any of Carnival's other vessels has ever called at a Washington port.

The United States Court of Appeals for the Ninth Circuit concluded in this case that although due process does not permit *general jurisdiction*, it does permit *specific jurisdiction*. *Shute v. Carnival Cruise Lines*, 863 F. 2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989).[1] Thus, the only inquiry remaining for this court is whether Washington's long-arm statute precludes jurisdiction on the facts of this case. *See Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 756, 757 P.2d 933 (1988).

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[1] Although an opinion which has been withdrawn has no precedential value, we agree with the reasoning of the United States Court of Appeals for the Ninth Circuit in *Shute*.

The "long-arm" statute, RCW 4.28.185(1)(a) provides in relevant part:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state;

It is well established in Washington "that under the long-arm statute, RCW 4.28.185, our courts may assert jurisdiction over nonresident individuals and foreign corporations to the extent permitted by the due process clause of the United States Constitution, except as limited by the terms of the statute." *Deutsch v. West Coast Mach. Co.*, 80 Wn.2d 707, 711, 497 P.2d 1311, *cert. denied*, 409 U.S. 1009 (1972). We are thus asked to determine what limits are provided by the statute.

Our long-arm statute is patterned after the Illinois statute. *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 109, 381 P.2d 245 (1963). The Illinois statute "reflects on the part of the legislature 'a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause.'" *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 109, 381 P.2d 245 (1963) (quoting *Nelson v. Miller*, 11 Ill. 2d 378, 389, 143 N.E.2d 673 (1957)). *See also* E. Cleary & A. Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 Nw. U.L. Rev. 599 (1956). The same has been said of RCW 4.28.185. *See, e.g.*, Note, *In Personam Jurisdiction Expanded—Force and Effect of Service of Process Outside of State*, 34 Wash. L. Rev. 323, 326, 329 (1959). We interpret the statute relying upon this conceptual foundation.

In order to subject nonresident defendants and foreign corporations to the *in personam* jurisdiction of this state under RCW 4.28.185(1)(a), the following factors must coincide:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
>
> (2) the cause of action must arise from, or be connected with, such act or transaction; and
>
> (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Deutsch v. West Coast Mach. Co., 80 Wn.2d 707, 711, 497 P.2d 1311, (citing *Oliver v. American Motors Corp.*, 70 Wn.2d 875, 425 P.2d 647 (1967) and *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963)), *cert. denied*, 409 U.S. 1009 (1972). In *Werner v. Werner*, 84 Wn.2d 360, 365, 526 P.2d 370 (1974), the court noted that:

> These factors are, in part, a distillation of the due process standards announced in *Interna'ional Shoe Co. v. Washington*, [326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945)], and refined in *Hanson v. Denckla*, [357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228, (1958)]; *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 94 L. Ed. 1154, 70 S. Ct. 927 (1950); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 96 L. Ed. 485, 72 S. Ct. 413 (1952); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957).

Thus, when the federal courts regard the due process standard and the statutory standard under RCW 4.28.185 as a single inquiry,[2] it is based upon a concept firmly rooted in our case law.

The United States Court of Appeals for the Ninth Circuit concluded that Carnival's actions were more than sufficient to satisfy the requirements of due process. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1442 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989). Carnival's solicitation of business in this state was purposefully directed at Washington residents. We find this sufficient to constitute a "purposeful act" under the *first prong* of our statutory test.

The federal appellate court also concluded that "jurisdiction over Carnival is reasonable in this case." *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1446 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989). We agree. Given Carnival's efforts to exploit the Washington market, we cannot say that it would offend "traditional notions of fair play and justice" for Washington to assert jurisdiction. Thus, the *third prong* of our statutory test is satisfied.

As a result of the holdings by the trial and appellate courts in *Shute* and by our Court of Appeals in *Banton*, this case turns on the *second prong* of our statutory test —whether the Shutes' claim "arises from" Carnival's promotional efforts in Washington within the meaning of RCW 4.28.185.

Our statutory test, first announced in *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963), was adapted from a law review case note. *See Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.

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[2] *E.g., Pedersen Fisheries, Inc. v. Pattie Indus. Inc.*, 563 F. Supp. 72, 74 (W.D. Wash. 1983); *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1440 n.1 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989).

2d 106, 115 n.1, 381 P.2d 245 (1963). In considering whether a cause of action "arises from" a party's contacts with a forum state, the article anticipated that a "cause of action might come to fruition in another state, but because of activities of defendant in the forum state there would still be a 'substantial minimum contact.'" Note, *Jurisdiction Over Nonresident Corporations Based on A Single Act: A New Sole for International Shoe*, 47 Geo. L.J. 342, 351 (1958). The article later stated:

> From the standpoint of fairness it should make no difference where the cause of action matured, so long as it could not have arisen *but for the activities of the nonresident firm in the forum where it is ultimately sued.*

(Italics ours.). Note, *Jurisdiction Over Nonresident Corporations Based on A Single Act: A New Sole for International Shoe*, 47 Geo. L.J. 342, 355 (1958).

The United States Court of Appeals for the Ninth Circuit adopted essentially this same "but for" analysis for the "arising from" prong of its test to determine whether the exercise of specific jurisdiction comports with due process. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1444 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989).

The "but for" test has been criticized. *See, e.g., Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971, 975 (D. Kan. 1986); *Russo v. Sea World of Florida, Inc.*, 709 F. Supp. 39, 42 (D.R.I. 1989). However, any criticism that the "test" reaches too far is answered by the federal court's tempering of its "but for" test with an additional consideration. "If the connection between the defendant's forum related activities [and the claim] is 'too attenuated,' the exercise of jurisdiction would be unreasonable". *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1445 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989).

While other tests or rules have been suggested, we do not consider them appropriate for adoption by this court. *See, e.g., Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971 (D. Kan. 1986) (contact must attach duty alleged to be breached); *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986) (contact must be a material element of proof of claim); *Banton v. Opryland U.S.A., Inc.*, 53 Wn. App. 409, 767 P.2d 584 (1989) (contact must be a proximate cause of the injury).

Relying on *Banton v. Opryland U.S.A., Inc.*, 53 Wn. App 409, 767 P.2d 584 (1989), Carnival argues that the "but for" test extends jurisdiction too far. The United States Court of Appeals for the Ninth Circuit withdrew its opinion in this case after *Banton* interpreted RCW 4.28.185(1)(a). *Banton*, on facts comparable to the present case, denied jurisdiction under RCW 4.28.185 (1)(a) because the claim did not "arise from" the defendant's contacts with Washington. We therefore examine that decision.

The *Banton* court first noted that this State has little case law interpreting the "arising from" portion of the long-arm statute. *Banton v. Opryland U.S.A., Inc.*, 53 Wn. App. 409, 413, 767 P.2d 584 (1989). After observing that "[n]one of [the Washington] cases determine whether a suit for personal injuries suffered outside the forum against a foreign corporation 'arises from' that corporation's promotion and consummation of business transactions within the State", the court then looked to cases from other jurisdictions.

Among the cases relied upon by the court in *Banton* to "provide persuasive authority that Banton's cause of action does not arise from Opry's contacts in Washington", were *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986) and *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983). *See Banton v. Opryland U.S.A., Inc.*, 53 Wn. App. 409, 413, 767 P.2d 584 (1989). Both courts found no jurisdiction on facts com-

parable to those in this case. However, those cases employed a "proximate cause" analysis in determining whether a claim arises from forum contacts. *See Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1444 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989). Their reasoning was specifically rejected by the United States Court of Appeals for the Ninth Circuit.

Although the 1988 *Shute* opinion was available to the Washington Court of Appeals before it published *Banton* in February 1989, the briefs do not indicate that *Shute* was brought to the attention of the court. We thus conclude that Division One did not consider the *Shute* opinion when it decided *Banton* and that the result arguably would have been different if it had considered the then existing precedent from the Court of Appeals for the Ninth Circuit.

Carnival contends that the "great weight of authority" disfavors jurisdiction on comparable facts.[3] However, the authorities it cited are not controlling. We find them unpersuasive. We also note that other courts have asserted jurisdiction under circumstances similar to this case.[4]

The federal circuits are divided on whether jurisdiction will lie under the circumstances present in this case. We cannot reconcile the division. We conclude that Washington's long-arm statute extends jurisdiction to the limit

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[3] *See, e.g., Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); King v. Carnival Cruise Lines, No. 82-7291 (W.D. La. Mar. 9, 1984) (Westlaw, Allfeds database); Alexander v. Carnival Tours, Inc., No. 86-A-1951 (D. Colo. Dec. 11, 1986) (Westlaw, Allfeds database); *Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971 (D. Kan. 1986); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2d Cir. 1964); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983).

[4] *See, e.g., Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D. Ill. 1987); *Everett v. Carnival Cruise Lines*, 677 F. Supp. 269 (M.D. Pa. 1987); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985).

of federal due process. The United States Court of Appeals for the Ninth Circuit has determined that federal due process permits specific jurisdiction in this case. We will not deny Washington plaintiffs the benefit of that determination.

We adopt the "but for" test of *Shute v. Carnival Cruise Lines*, 863 F.2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989), and hold that there is sufficient connection between the Shutes' claim and Carnival's Washington contacts to support long-arm jurisdiction under RCW 4.28.185. "But for" Carnival's "transaction of any business within this state," Mrs. Eulala Shute would not have been injured on respondent's cruise ship. Therefore her claim "arises from" Carnival's Washington contacts within the meaning of Washington's long-arm statute.

We answer "yes" to the question certified to us in this case by the United States Court of Appeals for the Ninth Circuit.

WE CONCUR:	/s/
/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C86-1204D

EULALA SHUTE and RUSSEL SHUTE,
husband and wife,
Plaintiffs,

v.

CARNIVAL CRUISE LINES, a foreign corporation,
Defendants.

ORDER

This matter is before the Court on motion of defendant Carnival Cruise Lines, Inc. (Carnival) for summary judgment dismissal on two grounds:

1. This Court lacks personal jurisdiction over the defendant, and;

2. The passenger ticket contract between the plaintiff and the defendant requires the plaintiff to bring all claims against the defendant in a court located in the State of Florida.

In the alternative, Carnival has also moved for a transfer of this cause of action to the U.S. District Court for the Southern District of Florida. This Court addresses only the issue of personal jurisdiction. The Court has reviewed the motions, affidavits, and memoranda submitted by each of the parties and grants defendant's motion for summary judgment dismissal on grounds that

there is no personal jurisdiction over defendant in Washington State.

The grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lew v. Kona Hospital*, 705 F.2d 1420, 1423 (9th Cir. 1985).

The following facts are undisputed:

During 1986 Russel and Eulala Shute, plaintiffs, contacted a travel agent at Smokey Point Travel in Arlington, Washington, and arranged to purchase tickets on the M/V TROPICALE, a vessel chartered by Carnival Cruise Lines, Inc., for a cruise to Puerto Vallarta, Mexico. The plaintiffs' tickets were issued to them from Florida with California as the port of embarcation.

While cruising off the coast of Mexico, Eulala Shute participated in a guided tour of the galley of the M/V TROPICALE. While in the galley the plaintiff slipped and fell on the wet floor. The Shutes filed this action alleging that Carnival Cruise Lines was negligent, and as a result of their negligence, Eulala Shute was injured.

Carnival Cruise Lines is a Panamanian corporation doing business in Miami, Florida. It is not registered to do business in the State of Washington. It does not own or lease real property in Washington. It has never maintained an office or bank account in Washington. It has never been required to pay any business taxes in Washington. It has never operated ships which have called on Washington ports. It has never had an exclusive agency in Washington. Smokey Point Travel is not an exclusive agent for Carnival Cruise Lines. Carnival Cruise Lines does advertise its vacation cruises in local newspapers in Washington, pays travel agencies a 10% commission on proceeds of tickets sold to prospective customers for

Carnival Cruise Lines vacations, and conducts promotional seminars for travel agents in Washington.

In its answer and by this motion the defendant asserts that this Court lacks jurisdiction over the defendant, the Carnival Cruise Lines.

To establish the existence of personal jurisdiction in a diversity case, the plaintiff must show (1) that the statute of the forum confers personal jurisdiction over the nonresident defendant, and (2) that the exercise of jurisdiction accords with federal constitutional principles of due process. *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986). *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987). *Data Disc, Inc. v. Stems Tech. Assoc., Inc*, 557 F.2d 1280 at 1286 (9th Cir. 1977). The Washington long arm statute states that

> Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) the transaction of any business within the states; . . .

RCW 4.28.185(1)(a).

If a defendant is found to have minimum contacts with Washington State and if maintenance of an action against them does not offend the "traditional notions of fair play and substantial justice," due process is also satisfied. *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278 (1940).

General jurisdiction will attach even if the cause of action is unrelated to Carnival's activities in Washington if such activities are substantial or continuous and systematic. *International Shoe*, 326 U.S. at 318. Carnival's contacts with Washington, however, are insufficient to warrant general jurisdiction. *Sarda M. Clark v. Carnival Cruise Lines, Inc.*, No. C84-4444TB (W.D. Wa. Jan. 16, 1987) (finding no personal jurisdiction on similar facts). There is no evidence that the above-stated contacts are continuous and systematic. In 1985 and 1986 Carnival derived only 1.29% and 1.06% of their total income from Washington residents. Such figures show that the results from the seminars and the advertising are not substantial.

For limited jurisdiction to be granted the court must evaluate the defendant's forum-related activities in relation to the plaintiff's cause of action with the following three-prong test:

> 1. The nonresident defendant must do some act or consummate some transaction within the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> 2. The claim must be one which arises out of or results from the defendant's forum-related activities; and
>
> 3. Exercise of jurisdiction must be reasonable.

Data Disc, 557 F.2d at 1287.

Carnival did not purposefully avail itself of the benefits and protections of Washington law by merely advertising, issuing a ticket in Florida to a Washington travel agent who is not a sole agent for Carnival, or by conducting promotional seminars in Washington. *Sarada M. Clark v. Carnival Cruise Lines, Inc., supra*; *Helicopteros Nacionales de Colombia v. Hall*, 406 U.S. 408, 416 (1984).

This purposeful availment requirement is the test for the fundamental determination of whether "the defend-

ant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there." *World-Wide Volkswagen*, 444 U.S. 297, 100 S.Ct. 567; *see Haisten*, 784 F.2d at 1397; *Lake v. Lake, supra.* In this case Carnival, a Panamanian corporation, has subjected itself to the jurisdiction of Florida. Defendant likely has advertising and seminars nationwide which are substantially similar to those in Washington. In the event an entire ship should sink, it would be unreasonable for the defendant to anticipate being hauled into court in all 50 states Yet, to find there is limited jurisdiction in this case would amount to the same thing.

The additional contact of conducting seminars was not addressed in *Clark, supra*; however, this Court finds that such actions were not a "substantial connection" to Washington.

A substantial connection "between the defendant and the forum state [is] necessary for finding minimum contacts [and] must come about by an action of the defendant purposefully directed toward the forum state." *Asahi Metal Industry Co. v. Superior Court*, 94 L. Ed.2d 92 (March 1987), *citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

In order to find limited jurisdiction, the cause of action must arise out of that particular purposeful contact of the defendant with the forum state. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957); *Lake, supra*, at 9. Plaintiffs do not state that they chose Carnival Cruises as a result of their advertising. Defendants properly state that this tort action did not "arise out of" or "result from" defendants' advertising or seminars. The tort did not occur as a direct result of the defendant's advertising. *Cheyne v. Klosters Rederi, d/b/a Norwegian Caribbean Lines*, C81-1253R (1982).

THEREFORE, defendants' motion for summary judgment dismissal is GRANTED. The Court finds no basis for personal jurisdiction in Washington State.

The Clerk of this Court is instructed to send a copy of this Order to all counsel of record.

DATED this 25th day of June, 1987.

/s/ Carolyn R. Dimmick
CAROLYN R. DIMMICK
United States District Judge

U.S. Const., Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. XIV § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

46 U.S.C. § 183b. Stipulations limiting time for filing claims and commencing suit

(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period

for institution of suits to be computed from the day when the death or injury occurred.

(b) Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim—

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner.

(c) If a person who is entitled to recover on any such claim is mentally incompetent or a minor, or if the action is one for wrongful death, any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such incompetent, minor, or decedent's estate, but shall be applicable from the date of the appointment of such legal representative: *Provided, however*, That such appointment be made within three years after the date of such death or injury. R.S. § 4283A, as added Aug. 29, 1935, c. 804, § 3, 49 Stat. 960.

46 U.S.C. § 183c. Stipulations limiting liability for negligence invalid

It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such

loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect. R.S. § 4283B, as added June 5, 1936, c. 521, § 2, 49 Stat. 1480.

28 U.S.C. § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

28 U.S.C. § 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district

shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

Fed. R. Civ. P. 4(e)

SUMMONS: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Wash. Rev. Code Ann. 4.28.185:

Personal service out of state—Acts submitting person to jurisdiction of courts—Saving

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting;

(e) The act of sexual intercourse within this state with respect to which a child may have been conceived;

(f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an

action in which jurisdiction over him is based upon this section.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

No. 89-1647

In The

Supreme Court of the United States

October Term, 1989

CARNIVAL CRUISE LINES, INC.,

Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Ninth Circuit Court of Appeals correct in finding that the Petitioner's contacts within the State of Washington and Petitioner's efforts directed at the residents of the State of Washington were sufficient for the constitutional exercise of the Washington long-arm statute?

2. Is the forum selection clause printed on a steamship passenger ticket enforceable in the factual context of this case?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, dated February 22, 1990, is to be reported at 897 F.2d 377 and is reproduced at pages 1a-24a of the Petitioner's Appendix. The original opinion of the Court of Appeals, dated December 12, 1988, is reported at 863 F.2d 1437 and reproduced at Pet. App. 25a-48a. The order of the Court of Appeals withdrawing the original opinion and certifying a question to the Supreme Court of Washington is reported at 872 F.2d 930

and reproduced at Pet. App. 49a The opinion of the Washington Supreme Court on the certified question is reported at 113 Wash. 2d 763 and 783 P.2d 78 and reproduced at Pet. App. 50a-59a. The order and judgment of the United States District Court for the Western District of Washington, dated June 25, 1987, are not reported and are reproduced at Pet. App. 60a-65a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1990. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves: the due process clauses of the Fifth and Fourteenth Amendments; two provisions of the Limited Liability Act: 46 U.S.C. § 183(b) & 183c and 28 U.S.C. § 1404(a) & 1406(a); Rule 4 of the Federal Rules of Civil Procedure; and the Washington long-arm statute Wash. Rev. Code Ann. § 4.28.185. These materials are reprinted at Pet. App. 66a-71a.

COUNTERSTATEMENT OF THE CASE

This is an action which arises out of a personal injury on board a cruise ship, the M/V TROPICALE, in April of 1986. Plaintiffs were passengers on board that vessel. This action is brought, in Admiralty, pursuant to 28 U.S.C.

§ 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. Mrs. Shute was injured while the vessel was in international waters. See Pet. App. 2a.

The plaintiffs are residents of the State of Washington and purchased their tickets in the State of Washington from a local travel agency. The affidavit of Lynn Weber substantiates that the tickets were purchased through her, and that Mrs. Shute paid for the tickets by giving a check to the travel agent, and received the tickets from the travel agent. The entire transaction took place in the State of Washington. Ms. Weber's affidavit is attached to this brief as Respondent's Appendix 1. The case was initially dismissed by the Honorable Carolyn Dimmick for want of jurisdiction. See Pet. App. 60a-65a. This decision was reversed by the Ninth Circuit Court of Appeals in their decision which has been published at 863 F.2d 1437, which is reproduced in Petitioner's Appendix pages 25a-48a. This decision was withdrawn in order to allow the Washington State Supreme Court to answer a question regarding the scope of the Washington State long-arm statute, Wash. Rev. Code Ann. § 4.28.185. The Supreme Court's opinion is reproduced in the Petitioner's Appendix. In that decision, the Washington State Supreme Court adopted the "but-for" requirement articulated by the Ninth Circuit Court of Appeals in their earlier decision. They specifically found that the activities of Carnival Cruise Lines, Inc., within the State of Washington, and directed at the residents of the State of Washington, were sufficient for the constitutional exercise of the Washington State long-arm statute. Based upon this decision, which is recorded at 113 Wash. 2d 763 and reproduced in the Petitioner's Appendix, the Court of

Appeals reissued its earlier decision. That decision is recorded at 897 F.2d 377 and is reproduced in Petitioner's Appendix.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THERE IS NO TRUE CONFLICT BETWEEN THE CIRCUITS AS TO WHEN A CAUSE OF ACTION ARISES OUT OF THE ACTIVITIES IN THE FORUM STATES.

Petitioner is correct that the issue in this case, at least as to jurisdiction, is a determination of what kind of relationship is necessary between a plaintiff's cause of action and a defendant's contacts with the forum state in order to establish a basis for specific *in personam* jurisdiction consistent with the due process clause of the Fourteenth Amendment. However, Petitioner incorrectly asserts that there is a true division of authorities between the various circuit courts. In reality, the divisions between the circuit courts are semantic divisions. The tests involved in all circuits are, in reality, tests to determine whether or not the assertion of jurisdiction is reasonable under the circumstances.

In fact, the court has effectively disposed of this issue in its earlier rulings in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985), *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and *Calder v. Jones*, 465 U.S. 783 (1984). These cases recognize that specific jurisdiction is appropriate when the defendant has purposely directed its activities at the residents of a state, or purposely availed itself of the benefits of doing business in the state

in order to secure an economic benefit. The Court has recognized that in the modern age, it is not necessary for a corporation to maintain or own property within a state in order for it to conduct business within that state. See *Burger King Corporation v. Rudzewicz*, supra, at 476. The Court in *Burger King Corporation v. Rudzewicz*, supra, recognizes that a substantial amount of business is conducted across the lines by mail, telephone, and wire transactions. In this case, it is undisputed that the contacts that Carnival maintains with the State of Washington are not random or fortuitous, but are systematic. Advertising campaigns are, by nature, a systematic and continuous enterprise. The actions of the appellant in holding sales seminars within the state, paying for the commissions of travel agents, and selling tickets to in-state residents establish a commercial presence within the jurisdiction. Petitioner admits that it receives a commercial benefit from these efforts in the form of sales to Washington residents. The Washington State Supreme Court held that there were ample contacts for the exercise of jurisdiction under the Washington long-arm statute. Modern commercial practices and the advanced state of telecommunications make it very easy for a corporation to transact business within a state without establishing a physical presence therein. If Petitioner is willing to transact business in Washington for its own benefit, it is not unreasonable, nor does it offend traditional notions of fair play to expect Petitioner to defend a suit in this state which arises from its activities.

The only division of authority which exists is in the interpretation of the term "arises from" in regard to specific jurisdiction. In the First and Eighth Circuits, in the

cases of *Marino v. Hyatt Corporation*, 793 F.2d 427 (1st Cir. 1986) and *Pearrow v. National Life and Accident Insurance Co.*, 703 F.2d 1067 (8th Cir. 1983), respectively, an extremely restrictive view has been taken. These cases seem to take the position that the defendant's presence, or efforts directed at the residents of the state must be of the same nature or type as that causing the injury. The Ninth Circuit, in *Shute v. Carnival Lines*, supra, takes the more reasonable position. They reasoned that, but for the activities of the defendant in the state, no business relationship would have occurred and the plaintiff would not have been injured.

The Washington long-arm statute, Wash. Rev. Code Ann. § 4.84.185, provides as a basis for the assertion of jurisdiction "transacting of business" within the state. If the argument of Petitioner in this action were adopted, this would be limited to business torts, or torts which actually occur within the borders of the state. This is obviously not the intent of the Washington State legislature, and in fact, cases involving personal injury make up the majority of cases involving the "transacting of business" as grounds for long-arm jurisdiction. See *Callahan v. Keystone Fireworks Manufacturing Company*, 72 Wash. 2d 823, 735 P.2d 626 (1967) and *Deutsch v. West Coast Machinery Corporation*, 80 Wash. 2d 707, 497 P.2d 1311 (1972). In the *Callahan* case, for example, the actual injury occurred in Idaho.

In reality, the circuit courts have come to different conclusions based upon different interpretations of what is reasonable, and what is too tenuous a result or connection between the defendant and the forum state. These disputes can be resolved factually, on a case by case basis,

and do not require the intervention of this Court. This is not an appropriate case for the grant of certiorari.

II. THE FORUM SELECTION CLAUSE IN THIS CASE IS IN VIOLATION OF A FEDERAL STATUTE, AND THERE IS NO TRUE DIVISION IN THE COURTS AS TO ITS ENFORCEABILITY.

46 U.S.C. § 183(c) makes it unlawful for a shipping line to include in a ticket contract:

> "provision or limitation . . . purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss, or injury, or the measure of damages therefor."

Provisions which violate the statute are deemed to be void. The Petitioner's rather disingenuous argument that because the forum selection clause is not listed specifically in the statute, it is therefore expressly permitted, ignores the remedial nature of the statute, and its expansive wording. The Court of Appeals in this case did not reach the issue as to whether or not the statute rendered this provision void. At footnote 9 of their decision they state:

> "Because we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of this statute on forum selection agreements. We do note, however, that the statute exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners, and the need for independent examination of the fairness of this type of contract."

A much more appropriate analogy can be drawn to a similar provision in the Carriage of Goods by Sea Act, (COGSA), 46 U.S.C. § 1303(a). Courts interpreting forum selection clauses in bills of lading have found them to be void. See *Indussa Corp. v. S. S. Ranborg*, 377 F.2d 200 (2d Cir. 1968) and *Mitsui & Co. Limited v. M/V GLORY RIVER*, 464 F. Supp. 1004 (W.D. Wash. 1978). This recognizes Congress's intent to prevent the shipowner from exercising unfair bargaining power.

Cases cited by Petitioner, in particular *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), ("The Bremen"), deal with commercial towing contracts. The basis of The Bremen decision was that the parties to those contracts have approximately equal bargaining power. The Court in *The Bremen*, supra, states that such contracts should not be set aside unless one party can clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud, or overreaching or overweening bargaining power. *The Bremen*, supra, at 407 U.S. 12. In this case, it is difficult to imagine a clearer instance of one party having all the bargaining power and the other party having none. The passenger purchasing a ticket in this case has no opportunity to negotiate the conditions of his or her ticket. The result of a forum selection clause such as this, is to require the plaintiffs to bring an action thousands of miles away from where the accident occurred, or the plaintiff's residence; and in a forum which has no logical connection to the action itself.

Petitioner cites several cases to support its argument that there is a division in the circuits, but a closer examination of the facts of those cases show that they are

clearly distinguishable from the case at bar. In *Hodes v. S. N. C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3rd Cir. 1988), the Court upheld the clause, because it did not find that the forum selection clause was unreasonable. 46 U.S.C. § 183 did not apply because the voyage did not touch the United States. The Court noted, at 913 of the opinion, that the selection of Italy as a forum was not unreasonable because the voyage began and ended in Italy, the vessel was owned by an Italian company, operated by an Italian crew, and only about ten percent of the passengers were from the United States. Under those circumstances, the selection of an Italian forum was not unreasonable, and passengers should expect to have to go to Italy to sue. The same is true in *Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D.Ill. 1987), a case in which an Illinois passenger sued, in diversity, in his own State of Illinois. The District Court transferred the action to Florida, based on an identical forum selection clause. In that case the Court found, at 472, that the advertising solicitation of travel agents, distribution of brochures, and sales of tickets were sufficient for the exercise of long-arm jurisdiction, but found that a change of venue was appropriate. The Court noted, at 479 of the opinion, that the tort occurred in territorial waters off Florida, that the voyage began and ended in Florida, and that most of the witnesses were in Florida. In cases such as this, and in *Hollander v. K-Lines Hellenic Cruises*, 670 F. Supp. 563 (S.D.N.Y. 1987), the courts have found that when there is a logical and reasonable basis for the forum selection clause, it will be enforced, even when it is not actually negotiated by the parties. This is not the case here.

In this case, there is no connection between this action and the State of Florida other than the location of the Petitioner's corporate headquarters. The voyage began and ended in California, the ticket was purchased in Washington, the plaintiffs are residents of Washington, and the treating physician of Mrs. Shute, as well as several of the eye-witnesses, reside in Washington. The forum selection clause in this case serves no logical basis and its only purpose is to hinder the respondents in their action.

Based upon the facts in this case, certiorari should not be granted. The cases cited by Petitioner are clearly distinguishable, as most of them involve foreign cruises. This is a cruise beginning and ending in the United States. Respondents would also contend that this is a case in which the appropriate statute, 46 U.S.C. § 183c, renders the forum selection clause invalid.

CONCLUSION

The petition for certiorari should be denied.

Respectively submitted,

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Counsel of Record

RESPONDENTS' APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

EULALA SHUTE and RUSSEL SHUTE, husband and wife, Plaintiffs, v. CARNIVAL CRUISE LINES, a foreign corporation, Defendant.	IN ADMIRALTY NO. C86-1204D AFFIDAVIT OF LYNN WEBER

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

LYNN WEBER, duly sworn on oath, deposes and states:

1. I make this Affidavit from my own personal knowledge.

2. I have worked as a travel agent in the State of Washington for seven years.

3. I am presently employed as a travel agent at Smokey Point Travel, 3210 Smokey Point Drive, Arlington, Washington. I have worked there three years.

4. In my work as a travel agent, I have become familiar with Carnival Cruise Lines and have sold a number of tickets for Carnival Cruise Lines cruises.

5. Carnival Cruise Lines is a well-known cruise ship line both in Washington and on a national level.

6. Carnival Cruise Lines advertises regularly in Washington papers and I have seen and am familiar with their advertisements.

7. Carnival Cruise Lines periodically holds seminars for travel agents in the State of Washington to inform them about Carnival Cruise Lines cruises and to encourage said Washington travel agents to sell Carnival Cruise Lines cruises. I have attended these seminars.

8. Carnival Cruise Lines mails brochures to travel agents, including Smokey Point Travel. These brochures describe and explain their cruises. The travel agent, in turn, distributes this information to consumers.

9. When a consumer decides on a cruise, they pay money directly to Smokey Point Travel which, in turn, then contacts Carnival Cruise Lines, makes the reservations, and forwards payment to Carnival Cruise Lines.

10. Carnival Cruise Lines, after receipt of payment, sends the passage tickets and further information brochures to the travel agency which then contacts the consumers and forwards the ticket and information brochure to them.

11. For each cruise arranged, the travel agent receives a commission from Carnival Cruise Lines.

12. I sold to Eulala and Russel Shute Carnival Cruise Lines tickets for a March, 1986 cruise on the MV/ Tropical.

/s/ Lynn Weber
LYNN WEBER

SUBSCRIBED AND SWORN to before me this 18th day of May, 1987.

/s/ Illegible
NOTARY PUBLIC in and
for the State of Washington,
residing at Mukilteo, Washington
My comm. expires 8/30/88

89-1647

No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

CARNIVAL CRUISE LINES, INC.,
Petitioner,

vs.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE INTERNATIONAL COMMITTEE OF PASSENGER LINES AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MOTION BY THE INTERNATIONAL COMMITTEE OF PASSENGER LINES FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The International Committee of Passenger Lines ("International Committee") respectfully moves this Court for leave to file the accompanying *Amicus Curiae* Brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Petitioner has consented to leave for this purpose, but Respondent has not. Therefore, leave to file must be sought pursuant to Supreme Court Rule 37.2.

1. NATURE OF *AMICUS'* INTEREST

The International Committee is a domestic non-profit association of sixteen passenger cruise lines operating 81 vessels in and about North America. Passenger cruises have become increasingly popular, and now represent a substantial market for vacation

time and expenditure by United States citizens.[1] Cruise vessels typically visit multiple ports of call (foreign and domestic) and attract passengers from many locales in the United States. The use of forum selection clauses in passenger ticket contracts, designating a single venue for resolution of legal actions, is a universal practice. The Petition for Writ of Certiorari presents, in part, the question of the enforceability of such forum selection clauses.

2. RELEVANT MATTERS RAISED BY THIS *AMICUS* BRIEF WHICH MAY NOT BE ADDRESSED BY THE PARTIES

The International Committee believes there are important considerations of national uniformity of maritime law raised by the Petition for Writ of Certiorari which directly impact on the passenger cruise industry in the United States. Although fully endorsing Petitioner's reasons for granting the Writ of Certiorari on the first question presented—whether the lower court correctly determined that it could properly exercise specific personal jurisdiction—the Brief that this *Amicus Curiae* seeks leave to file is limited to the Petitioner's second question—concerning the enforceability of a forum selection clause in a steamship passenger ticket contract.

The Committee's *Amicus* Brief presents the cruise industry's perspective in seeking resolution of the conflict between the Ninth Circuit in the decision below and the Third Circuit in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *petition for cert. dismissed*, 109 S.Ct. 1633 (1989), as to the enforceability of these clauses. This issue is important to the

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[1] There has been a tremendous growth in the passenger cruise market over the past ten years. This market has increased from 1.4 million North American passengers in 1980 to over 3.3 million in 1989. It is estimated that in 1990, 3.5 million North American passengers will enjoy ocean cruises and that the figure will reach 10 million by the year 2000. *See* Cruise Lines International Association, "The Cruise Industry, An Overview" (unpublished report, January, 1990).

member lines of the International Committee because they are exposed to claims and suits in multiple jurisdictions.

Both the decision of the Ninth Circuit in this case and of the Third Circuit in *Hodes* rely principally on this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*"). The International Committee believes that the Ninth Circuit's decision is contrary to the principles established in *The Bremen* as to the presumptive enforceability of such forum clauses and represents a retreat to an earlier time when the courts held a provincial and disfavored view of such provisions.

The International Committee believes it can materially contribute to resolution of the important legal question of the enforceability of forum selection clauses in passenger ticket contracts. The issue has obvious importance beyond the interests of the Petitioner alone because each member cruise line relies on a forum selection clause in its ticket contract. As owners and operators of cruise vessels carrying United States passengers, each member of the International Committee has an immediate and substantial interest in resolving the conflict among the Circuits, and in establishing uniformity of the maritime law in the United States on this issue.

Respectfully submitted,

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No.

In the Supreme Court

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OCTOBER TERM, 1989

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

BRIEF OF THE INTERNATIONAL COMMITTEE OF PASSENGER LINES AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

The Ninth Circuit's decision below, holding that a forum selection clause in a passenger cruise ticket contract is unenforceable on grounds of public policy as a contract of adhesion, is squarely in conflict with the Third Circuit's decision on the same issue in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *petition for cert. dismissed*, 109 S.Ct. 1633 (1989). Both Circuit Courts relied on this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*"), holding that such a clause in a commercial maritime contract is entitled to presumptive validity. The Ninth Circuit's decision, refusing to grant such deference to the clause because it was included in a so-called contract of adhesion, is contrary to the rule of *The Bremen*. It is imperative to the passenger cruise industry that this Court establish a uniform rule to govern this aspect of maritime law.

II. REASON FOR GRANTING WRIT OF CERTIORARI

A. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AND ESTABLISH A UNIFORM LEGAL STANDARD FOR ENFORCING A FORUM SELECTION CLAUSE IN A MARITIME PASSENGER CONTRACT

The passenger ticket involved in this case is a maritime contract, and is governed by the substantive law of admiralty, not by the law of the states. *See The Moses Taylor,* 71 U.S. (4 Wall.) 411, 427 (1867); *and see Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959), *rehearing denied* 359 U.S. 962 (1959). The national interest in promoting the uniformity of the maritime law was originally set forth in *The Lottawanna,* 88 U.S. (21 Wall.) 558 (1874), and is based on Article III, Section 2 of the United States Constitution, which extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction."

The nature of maritime commerce requires that the substantive rules of law regulating the rights and responsibilities of shipowners and their passengers should not vary according to the jurisdiction in which the vessels operate. The need to establish and maintain uniform maritime laws has been repeatedly endorsed by this Court. *See e.g. Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917); *Garrett v. Moore-McCormack Co.,* 317 U.S. 239 (1942); *Romero v. International Terminal Operating Co., supra;* and *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 401-402 (1970).

The cruise line members of the International Committee issue passenger ticket contracts which include forum selection clauses. The ticket issued by Petitioner Carnival specifies a Florida forum, its principal place of business, for adjudicating disputes by passengers.

Ticket contracts have been used by cruise lines and other carriers of passengers for more than one hundred years. In fact, the issue of whether the terms and conditions of a ticket can be enforced by a common carrier was first brought to this Court in *The Majestic,* 166 U.S. 375 (1897) (holding that a provision in a

ticket limiting liability for lost or damaged baggage was unenforceable because it was not sufficiently incorporated into the portion of the ticket that constituted the contract), and was subsequently considered again in *New York Central & Hudson River Railroad Co. v. Beaham,* 242 U.S. 148 (1916) (holding that a ticket provision limiting liability for lost or damaged luggage was prima facie enforceable.) Numerous lower courts have dealt with the same issues. *See e.g.* cases cited in Annot. 31 ALR 4th 404, 415-438 (1989).

In the leading case of *Silvestri v. Italia Societa Per Azioni di Navigazione,* 388 F.2d 11 (2d Cir. 1968), Judge Friendly noted that the common thread running throughout the cases upholding limiting provisions in ticket contracts was the undeniable fact that the vessel owner had essentially done all that it reasonably could to warn the passengers that the conditions of the contract were important and affected their legal rights. When the terms and conditions of the ticket have been "reasonably communicated," they have been held to be binding.[2]

A contractually designated forum serves a legitimate purpose. In view of the diverse residences of passengers and the distant locales that cruise vessels may visit, a forum selection clause removes doubt as to where suit can be brought and avoids global litigation. See *The Bremen,* 407 U.S. at 13-14.

In *The Bremen,* this Court confirmed that a maritime contract is subject to interpretation under admiralty law, and held that the forum-selection clause in the contract was presumptively valid and enforceable. The decision in *The Bremen* represented this Court's approval of the trend away from the historical disfavor in

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[2] Decisions that applied the test of "reasonable communicativeness" to passenger tickets containing limiting clauses and enforced such provisions include, among others, the following: *Muratore v. M/S Scotia Prince,* 845 F.2d 347 (1st Cir. 1988); *Marek v. Marpan Two, Inc.,* 817 F.2d 242 (3d Cir.) *cert. denied* 484 U.S. 852 (1987); *Barbachym v. Costa Line, Inc.,* 713 F.2d 216 (6th Cir. 1983); *Carpenter v. Klosters Rederi A/S,* 604 F.2d 11 (5th Cir. 1979); and *McQuillan v. "Italia" Societa Per Azione di Navigazione,* 386 F. Supp. 462 (S.D.N.Y. 1974), *aff'd* 516 F.2d 896 (2d Cir. 1975).

which forum selection clauses had been held by some American courts. In *Scherk v. Alberto-Culver*, 417 U.S. 506, *rehearing denied*, 419 U.S. 885 (1974), this Court extended the rule of *The Bremen* to non-maritime contracts.

The ticket contract and facts presented to the Third Circuit in *Hodes* were similar to those in this case. A passenger was injured during an ocean voyage on a cruise ship. A forum selection clause contained in the ticket contract was asserted by the cruise line. As did the Ninth Circuit below, the Third Circuit relied upon *The Bremen* as providing the guiding principle. The Third and Ninth Circuits, however, reached different conclusions.

In *Hodes*, after ruling that the forum clause was effectively incorporated into the ticket contract, the court rejected the passenger's argument that the contract was unenforceable because of its adhesive nature. Relying on *The Bremen* and, in part, on the Restatement (Second) of Conflict of Laws, § 80 (1971), the Third Circuit held that there was no *unfair* use of unequal bargaining power and that the forum clause should be enforced. In contrast, the Ninth Circuit in this case held that, because of the adhesive nature of the contract (based on the presumed disparity in bargaining power), the forum selection provision was not entitled to such deference and was unenforceable as a matter of public policy. Pet. App. 46a-47a.[3]

The Ninth Circuit's decision in this case squarely conflicts with the Third Circuit in *Hodes* on the issue of the enforceability of a forum selection clause in a maritime passenger ticket contract. The conflict results directly from the Circuits' differing interpretation of this Court's decision in *The Bremen*.

The enforcement of forum selection clauses in passenger cruise contracts has been the subject of recurrent litigation in the lower courts. In light of the present conflict among the Circuits, this will likely occur with even greater regularity. Resolution of the confl

[3]The decision of the Ninth Circuit is reported at 897 F.2d 377. References to the decision in this Brief, however, will be to Petitioner's Appendix.

flict is essential to national uniformity under the maritime law and important to the passenger cruise industry.

B. The Court Should Correct The Decision Below Which Is Contrary To The Prima Facie Validity Accorded Forum-Selection Clauses In *The Bremen*

In *The Bremen*, this Court held that a forum selection clause in a maritime contract should control, absent a strong showing to the contrary. 407 U.S. at 15. Under this rule, the party seeking to resist enforcement of the chosen forum must bear a heavy burden of proof, even if the contract is characterized as adhesive. Id. at 17.

After acknowledging that this Court's decision in *The Bremen* controlled, the Ninth Circuit held that, because the passenger ticket contract was one of adhesion, the forum selection clause "should not receive the deference generally accorded [to] such provisions". Pet. App. 47a. By emasculating the heavy burden of proof which should have been cast on the passenger—even if the contract were adhesive—the Ninth Circuit ignored the rationale of this Court's decision in *The Bremen*. In addition, the Ninth Circuit reached its decision without mentioning either *Hodes* or the numerous other federal cases enforcing forum selection clauses in similar ticket contracts.[4]

After rejecting the presumptive validity of the forum clause, the Ninth Circuit proceeded to analyze the issue by weighing the relative conveniences of the plaintiff's chosen forum against the reasonableness of the contractual forum. The legal effect of the failure of the Ninth Circuit to accord presumptive validity to the

[4] *See e.g. Catalana v. Carnival Cruise Lines, Inc.*, 618 F. Supp. 18 (D. Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986); *Everett v. Carnival Cruise Lines Inc.*, 677 F. Supp. 269 (M.D. Pa. 1987); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563 (S.D.N.Y. 1987); *Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D. Ill. 1987); and *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985).

forum selection clause was to erroneously convert the issue for consideration into one of *forum non conveniens*.[5]

III

CONCLUSION

The International Committee of Passenger Lines respectfully urges the Court to grant the Petition for Writ of Certiorari to resolve the conflict among the Circuits and establish a uniform rule of maritime law, consistent with the precedent established by this Court.

Respectfully submitted,

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[5] The practical effect of the decision below encourages pre-trial motion practice, and necessitates the attendant expense. As noted by Mr. Justice Kennedy in his concurring opinion in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988), the federal judiciary has a strong interest in eliminating wasteful pre-trial motion practice. Correcting the decision below to conform with the presumptive validity of forum selection clauses as established in *The Bremen* will promote such interests and provide guidance to the district courts.

No. 89-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CARNIVAL CRUISE LINES, INC.,
Petitioner,
v.
EULALA SHUTE AND RUSSEL SHUTE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The Chamber of Commerce of the United States, pursuant to Supreme Court Rule 37.2, respectfully requests leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case. This motion is necessary because respondents, Eulala and Russel Shute, refused to consent to the filing of this brief. Petitioner, Carnival Cruise Lines, Inc. ("Carnival"), has consented.[1]

This case arises from a Washington district court's exercise of *in personam* jurisdiction over Carnival. The case involves the Shutes' Washington purchase of cruise

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[1] A copy of petitioner's consent letter is being filed simultaneously with this motion.

tickets from Carnival and the subsequent injuries the Shutes allegedly sustained in international waters during that cruise.

The issue presented concerns the required relationship between a cause of action and a nonresident defendant's contacts with the forum necessary to support an exercise of specific *in personam* jurisdiction consistent with the due process clause of the fourteenth amendment. The Ninth Circuit's holding that due process is satisfied when the defendant's forum contacts are a "but for" cause of the litigation will have substantial detrimental impact upon the business community—particularly small businesses that do not operate in national markets.

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, representing more than 180,000 companies as well as several thousand trade and professional associations and state and local chambers of commerce. Ninety-three percent of the Chamber's members are businesses with fewer than 100 employees, and seventy percent have fewer than twenty employees. The Chamber also sponsors The Counsel of Small Business which seeks to promote the needs of small businesses. The Chamber regularly presents its views before this Court and the lower federal courts.[2]

The Chamber has surveyed many of its small business members in the manufacturing, wholesale, retail, and service industries and determined that, particularly as applied to small businesses, the Ninth Circuit's ruling fails to account for the realities of the contemporary marketplace and will place prohibitive costs upon small businesses and the persons they employ. For these reasons, and as further set forth in the attached brief, the Chamber believes that the Ninth Circuit's ruling "offend[s] 'traditional notions of fairness and substantial justice,'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted), implicated by due process.

As the principal voice of the American business community, the Chamber is well-suited to represent the interests of small businesses in this case. Because the Chamber believes it is important for this Court to recognize the significance of this issue to the business community, the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

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[2] *See, e.g., Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989); *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989), *cert. granted*, 110 S. Ct. 1804 (1990); *FMC Corp. v. Holliday*, 885 F.2d 79 (3d Cir. 1989), *cert. granted*, 110 S. Ct. 1109 (1990); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Tull v. United States*, 481 U.S. 412 (1987).

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to the preceding Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

STATEMENT OF THE CASE

This case arises from a Washington district court's exercise of *in personam* jurisdiction over petitioner, Carnival Cruise Lines, Inc. ("Carnival"), a Panamanian cruise line with its principal place of business in Miami, Florida. The case involves the Washington purchase of cruise tickets by respondents, Eulala and Russel Shute,

from Carnival and the subsequent injuries the Shutes allegedly sustained in international waters during that cruise.

Carnival's ships do not make ports of call in Washington. Carnival's only contacts with Washington consist of placing advertisements for its cruises in newspapers, presenting seminars for travel agencies (including distributing brochures), and paying travel agencies a ten percent commission for tickets they sell. Carnival is not registered to do business in Washington, has never paid business taxes in the state, and does not maintain an office or bank account there.

After purchasing tickets from a Washington travel agency, the Shutes embarked from Los Angeles, California, upon Carnival's ship the M/V TROPICAL. While in international waters off the coast of Mexico, Eulala Shute was injured when she allegedly slipped on a deck mat.

The Shutes subsequently filed suit against the Miami-based Carnival in the United States District Court for the Western District of Washington, where the court dismissed the action for lack of *in personam* jurisdiction. *Shute v. Carnival Cruise Lines*, No. C86-1204D (W.D. Wash. June 25, 1987). On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding, *inter alia*, that an exercise of jurisdiction was consistent with the due process clause of the fourteenth amendment. *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990).

SUMMARY OF ARGUMENT

This Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Contrary to the mandates of the due process clause of the fourteenth amendment, the Ninth Circuit's ruling vitiates the distinction between general and specific *in personam* jurisdiction. The Ninth Circuit's ruling further violates the due process standard of fair play and substantial justice by rendering determination of specific *in personam* jurisdiction unpredictable, in that, particularly as applied to small businesses, the ruling permits an exercise of jurisdiction far beyond that which ordinary commercial experience supports. Moreover, if permitted to stand, the Ninth Circuit's ruling would have substantial detrimental impact upon small businesses, in contravention of long-standing national policy.

ARGUMENT

I. THE NINTH CIRCUIT'S RULING VITIATES THE DISTINCTION BETWEEN GENERAL AND SPECIFIC *IN PERSONAM* JURISDICTION

The due process clause of the fourteenth amendment permits a court acting pursuant to a state long-arm statute to exercise either general or specific *in personam* jurisdiction over a nonresident defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984). A court may exercise general jurisdiction over a defendant for any cause of action if the defendant has a "continuous and systematic" presence in the forum. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952). Where, as here, a defendant does not have a "continuous and systematic" presence in the forum, a court may exercise specific jurisdiction over the defendant where "the defendant [1] has 'purposefully directed' his activities at residents of the forum . . . and [2] the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and *Helicopteros Nacionales*, 466 U.S. at 414).

The Ninth Circuit held below that, for the purpose of satisfying the second prong of the specific jurisdiction

standard, a cause of action arises out of[1] activities in the forum where those activities are a "but for" cause of the injuries that are the subject of the litigation. *Shute*, 897 F.2d at 383-86. Contrary to the due process clause of the fourteenth amendment, however, the Ninth Circuit's "but for" test vitiates the distinction between general and specific jurisdiction.[2]

The Ninth Circuit's "but for" test, as illustrated more fully in part II, *infra*, permits a plaintiff to maintain a cause of action that bears no relationship, based upon reason or common experience, to a defendant's activities in the forum. Indeed, as one commentator noted, " 'the [but for] causes of an event go back to the discovery of America and beyond.' " Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 92 (quoting W. Prosser & P. Keeton, The Law of Torts 567 (4th ed. 1971)). Accordingly, in the absence of any real nexus between a defendant's forum contacts and the cause of action, the Ninth Circuit's test, in effect, renders a defendant sub-

[1] Because the Washington long-arm statute extends to the full extent permitted by due process, *Shute v. Carnival Cruise Lines*, 113 Wash. 2d 763, 783 P.2d 78 (1989), the Ninth Circuit apparently construed the words "arising out of" in the statute to be synonymous with the "arising out of or relating to" standard enunciated by this Court, *Shute*, 897 F.2d at 383-86, although the words "relating to" do not, in fact, appear in the statute. Wash. Rev. Code Ann. § 4.28.185 (1988).

Moreover, in a comment that portends this case, the Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, expressly reserved the issue of whether the terms "arising out of" or "related to" describe a different relationship to a cause of action. 446 U.S. at 415-16 n.10. The Court further stated: "Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action 'relates to,' but does not 'arise out of,' the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction." *Id. But see id.* at 424-28 (Brennan, J., dissenting).

[2] *Cf. Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986).

ject to an exercise of general jurisdiction for essentially any cause of action based only upon the showing of "purposefully directed" activities toward the forum required by the first prong of the specific jurisdiction standard. Through obviating the general jurisdiction requirement for a "continuous and systematic" presence in the forum, the Ninth Circuit's "but for" test vitiates the constitutionally-mandated distinction between specific and general jurisdiction.

Apart from the mandates of due process, the Ninth Circuit's "but for" test is logically inconsistent with the two-prong specific jurisdiction standard. Under the specific jurisdiction standard, it is axiomatic that a cause of action may arise out of or relate to *only* jurisdictional contacts with the forum sufficient to support a finding of "purposefully directed" activities. The Ninth Circuit's "but for" test, however, violates this axiom by holding that a cause of action may arise out of or relate to jurisdictional contacts with the forum *insufficient* to support a finding of "purposefully directed" activities.

Thus, in illustration, in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), this Court held that a defendant's placing an article into the stream of commerce, without more, did not constitute sufficient jurisdictional contacts with the forum to support a finding of "purposefully directed" activities in a personal injury action involving that article. *Id.* at 112. Notwithstanding the lack of sufficient jurisdictional contacts with the forum in *Asahi*, placing the article into the stream of commerce was nonetheless a "but for" cause of the accident. Accordingly, applying the Ninth Circuit's "but for" test would hold, contrary to the requirements of the specific jurisdiction standard, that the cause of action arose out of or related to jurisdictional contacts *insufficient* to support a finding of "purposefully directed" activities.[3]

[3] Similarly, *Hanson v. Denckla*, 357 U.S. 235 (1958), involved an heir's challenge to a nonresident trustee's administration of a trust

II. THE NINTH CIRCUIT'S RULING VIOLATES THE DUE PROCESS STANDARD OF FAIR PLAY AND SUBSTANTIAL JUSTICE INASMUCH AS IT RENDERS DETERMINATION OF JURISDICTION UNPREDICTABLE

The "constitutional touchstone," *Burger King*, 471 U.S. at 474, of the due process limitation on *in personam* jurisdiction is whether an exercise of jurisdiction "offend[s] 'traditional notions of fair play and substantial justice.'" *Asahi*, 480 U.S. at 113 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).[4] Accordingly, this Court has held that accepted notions of fairness and justice require that application of state long-arm statutes provide " 'a degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where . . . conduct will and will not render them liable to suit.'" *Burger King*,

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in the manner directed by the settlor. *Id.* at 238-41. The Court held that the presence in the forum of the settlor and her correspondence with a nonresident trustee directing administration of the trust provided insufficient contacts with the forum to establish jurisdiction over the trustee. *Id.* at 253-54. Once again, notwithstanding the lack of sufficient jurisdictional contacts with the forum in *Hanson*, the trustee's actions nonetheless were the "but for" cause of the litigation, because, in the absence of the trustee's corresponding with the settlor, the settlor's challenged instructions would not have been received and implemented. Thus, applying the Ninth Circuit's test to *Hanson* would hold, again contrary to the specific jurisdiction standard, that the cause of action arose out of or related to the trustee's jurisdictionally insufficient forum activities.

[4] The due process clause, through protecting an individual's liberty interest, also "operates to restrict state power." *Burger King*, 471 U.S. at 472 n.13. This restriction prevents a state, through its long-arm statute, from unreasonably asserting its sovereignty and, thereby, rendering "binding judgments" over another state's residents. *Id.* at 471-72. Here, the Ninth Circuit's ruling, through permitting jurisdiction to be supported by such an attenuated relationship between the cause of action and a defendant's forum contacts, disregards this important constitutional limitation on state power.

471 U.S. at 472 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The Ninth Circuit's "but for" test does not comport with the due process mandate of predictability required by accepted notions of fairness and justice. The Ninth Circuit's "but for" test permits a plaintiff to maintain a cause of action so attenuated from the defendant's actions in the forum as to exceed any reasonable "jurisdictional risk" [5] the potential defendant assumed based upon its limited contacts with the forum. The "but for" test thus permits an exercise of jurisdiction in circumstances that go far beyond the expectations that the ordinary commercial experience of potential defendants supports.

This lack of predictability, the Chamber's inquiry among its members revealed, bears particularly hard on small businesses—which do not operate in national markets and are left without any accessible standard upon which to "structure their primary conduct," *Burger King*, 471 U.S. at 472, and upon which to predict where they may be subject to suit.[6] A few simple examples, typical

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[5] *See* Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 649 (1988).

[6] The burden upon small businesses caused by the lack of predictability inherent in the Ninth Circuit's "but for" test is compounded by the absence of clear and uniform guidance regarding the constitutional showing required to satisfy the second prong of the specific jurisdiction standard. Thus, as the Ninth Circuit noted, *Shute*, 897 F.2d at 383-85, some courts construing state long-arm statutes (but not the fourteenth amendment) have applied an "arising from" test in exercising specific jurisdiction, *Marino v. Hyatt Corp.*, 793 F.2d at 430; *Pearrow v. National Life & Accident Insurance Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983), while other courts construing the fourteenth amendment appear to have applied a "but for" test. *Lanier v. American Board of Endodontics*, 843 F.2d 901 (6th Cir. 1988); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981). Still other courts have adopted somewhat different approaches. *City of Virginia Beach v. Roanoke River Basin Association*, 776 F.2d 484, 487 (4th Cir. 1985) ("coincides with" test); *Southwire Co. v. Trans-World Metals & Co.*, 735 F.2d 440, 442 (11th Cir. 1984) ("connected with" test).

of the Chamber's many small business members, aptly illustrate their plight under the Ninth Circuit's "but for" test.[7]

The Ninth Circuit's "but for" test would permit an Oregon district court to exercise jurisdiction over a small Washington manufacturer whose only contact with Oregon was that it shipped its products through the state by truck for sale in California, where they injured a visiting Oregon plaintiff. Under the Ninth Circuit's test, the suit would satisfy the second prong of the specific jurisdiction standard, inasmuch as, in the absence of the manufacturer's transporting its products through Oregon, the injuries would not have occurred.[8]

Similarly, a small Alaskan charter airline could be subject to suit in California where a California plaintiff was injured on one of the airline's flights, despite that the airline's only contact with California was its advertisement in a national fishing magazine read by plaintiff. Under the Ninth Circuit's "but for" test, the suit again would satisfy the second prong of the specific jurisdiction standard, inasmuch as the airline's solicitation in California was a "but for" cause of the claimed injuries.

Finally, a small Ohio wholesaler of specialty machine parts could be subject to a tortious breach of contract suit in California despite that its only contact with California was that, pursuant to a contract with an Ohio manufacturer, it delivered machine parts to the manufacturer's subcontractor in California. Under the Ninth Circuit's

[7] In contrast, most large national businesses are subject to suit in essentially all states.

[8] In this example, the manufacturer's transporting its products through Oregon is not, strictly speaking, a "but for" cause of the Oregon resident's injuries—that is, the products could have arrived through another route. However, the example satisfies the "but for" test as applied by the Ninth Circuit, which held that Carnival's solicitation in Washington was a "but for" cause of the Shutes' injuries, despite that nothing in logic or physical science requires such solicitation as a prerequisite to the Shute's injuries. *Shute*, 897 F.2d at 383-86.

"but for" test, this suit as well would satisfy the second prong of the specific jurisdiction standard, because, but for the delivery of the machine parts, the litigation would not have arisen.[9]

In the above examples, permitting a court to exercise specific jurisdiction over the defendant simply does not comport with the level of jurisdictional predicability mandated by " 'traditional notions of fair play and substantial justice.' " *Asahi*, 480 U.S. at 113 (citations omitted). In each example, the defendant is held subject to suit in the plaintiff's chosen forum without any basis from reasonable commercial experience upon which to predict that it could be subject to suit there.[10] Moreover, the plaintiff, thereby, is absolved of any jurisdictional risk: while maintaining his choice of forum, the plaintiff may, with impunity, choose to do business with a nonresident defendant without inquiring whether the defendant maintains any genuinely-related forum contacts.

III. THE NINTH CIRCUIT'S RULING, IF PERMITTED TO STAND, WILL HAVE SUBSTANTIAL DETRIMENTAL IMPACT UPON SMALL BUSINESSES IN CONTRAVENTION OF LONG-STANDING PUBLIC POLICY

A guiding force in this Court's enunciation of the modern law of *in personam* jurisdiction has been the need to adapt the law to the contemporary marketplace. *World-Wide Volkswagen*, 444 U.S. at 293-94; *Hanson*, 357 U.S. at 250-51. The Ninth Circuit's ruling, however, fails to

[9] This example further illustrates the absurd results the Ninth Circuit's "but for" test could compel, inasmuch as, under the test, the Ohio wholesaler could be subject to suit in any of the states through which its machine parts traveled en route to California.

[10] The Ninth Circuit's application of a "reasonableness" test to exercise of *in personam* jurisdiction, *Shute*, 897 F.2d at 386, does not effectively ameliorate the unfairness and injustice of the above examples, because, under the Ninth Circuit's test, a rebuttable presumption of "reasonableness" arises when "purposeful availment" of the forum's laws is established. *Id.*

account for the realities of the contemporary marketplace and will have substantial detrimental impact upon small businesses and the persons they employ.

Under the Ninth Circuit's ruling, a small business that has no reasonable basis upon which to gauge its jurisdictional risk must therefore protect against all conceivable risks. The Chamber's inquiry among its small business members revealed that the cost of protecting against these risks will be prohibitive for many small businesses.

The costs the Ninth Circuit's ruling imposes upon small businesses include substantially increased insurance costs to protect against suits in foreign jurisdictions arising from foreign law. Thus, if the Ninth Circuit's ruling is followed in other circuits, small businesses may be the next casualties of the national insurance crisis. More importantly, small businesses will have to bear the direct costs—which for them will be exorbitant—of implementing compliance with unique and unfamiliar laws in foreign jurisdictions with which they have only the most minimal of contacts.[11]

Additionally, the Ninth Circuit's ruling requires small businesses to bear alone the substantial cost of defending a suit in a distant forum. Such a result is both inequitable and economically inefficient in that it is the tort plaintiff who is best able to bear the cost of suing in a distant forum because the plaintiff more likely will be able to retain legal services on a contingency basis there.

Finally, the detrimental impact of the Ninth Circuit's ruling on small businesses contravenes long-standing national policy to "protect, insofar as is possible, the interests of small-business concerns in order to preserve free

[11] Although applicable choice of law provisions could reduce this cost, a small business nonetheless must protect against possible application of a foreign forum's law because choice of law provisions generally favor the forum state's law. Twitchell, *supra* note 4, at 664 (citing Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. Davis L. Rev. 869, 871 & nn.14-15 (1981).

competitive enterprise." 15 U.S.C. § 631(a) (1988). It is small businesses that are the source of economic innovation and renewal which is the life-blood of the American economy. Indeed, according to the Chamber's statistics, the United States has nineteen million small businesses that employ six out of every ten workers, create sixty-four percent of new jobs, and provide two out of every three workers their first job. Small businesses similarly account for twenty-one percent of the total United States manufacturing output, and account for more than twelve percent of the value of United States goods exported directly by manufacturers. The Ninth Circuit's ruling poses a definite and serious threat to the continued health of this national resource.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 8, 1990

No. 89-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 24, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

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The following materials have been omitted from this joint appendix because they appear on the following pages in the appendix to the petition for writ of certiorari:

DOCKET ENTRIES

(1) Official Docket Entries From U.S. District Court for the Western District of Washington

DATE	NR.	PROCEEDINGS
1986		
Aug 12	1	COMPLAINT—iss.'d s/c.
Aug 21	2	RET. SVC.—of s/c on Carnival Cruise Lines on 8-18-86.
Sep 5	3	NOTE. APPEAR—of R. Montgomer & J. Rodriguez-Atkatz as cnsl. for deft. Carnival Cruise Lines.
Sep 24	4	ANSWER—of deft. Carnival Cruise Lines.
Sep 25	5	NOTICE—of name change & new address for pltfs. cnsl. G. Wall.
Dec 1	6	STIP. & ORDER—granting deft. leave to file amended answer. C to c.
Dec 10	7	ORDER—Jt. status report due 90 da. C to c.
Dec 9	8	AMENDED ANSWER—of deft. Carnival Cruise Lines, Inc.
Mar 6	9	JOINT STATUS REPORT—discovery to be completed by 9-1-87, ELT: 3 day non-jury trial, 39.1 med. would be effective after 8-1-87.
Mar 11	10	MINUTE ORDER—Trial Settings & Related Dates: Trial Date: 1-11-88 ELT: 2 day non-jury Pretrial Order due: 12-28-87 Disc. completed by: 9-2-87 Dispositive motions filed no later than: 10-8-87 & noted on motion calendar no later than Fri.: 10-30-87 Trial Briefs Due: 1-4-88. Proposed voir dire & jury instructions due.: n/a Court des. case 39.1 med. upon completion of disc. c to

DATE	NR.	PROCEEDINGS
1986		
Apr 23	11	MOTION—defts. for s/j. note 5-15-87
	12	MEMORANDUM—defts. in sup. of.
	13	AFFID.—of J. Stein.
	—	LODGED ORDER
May 11	—	Ent. rec.'d letter from defts. cnsl. continuing mot. for s/j to 5-22-87.
May 15		Ent. defts mot. for s.j. sub. w/o arg.
May 18	14	CROSS-MOTION—pltfs for sum. jdmt. noted 6-12-87.
	15	MEMORANDUM—pltfs in sup. of mot. for sum. jdmt. & in response to defts mot. for sum. jdmt.
	16	AFFID—of Pamela J. Hinrichs in sup. of pltfs. cr. mtn. for sum. jdmt.
	17	AFFID.—of Lynn Webber
	18	DECLARATION—of Eulala Shute.
	19	DECLARATION—of Russel Shute.
		LODGED ORDER.
May 21	20	REPLY MEMORANDUM—defts in sup. of sum. jdmt.
May 22	—	Ent. deft's mot. for s/j sub. w/o arg.
	21	CORRECTION SHEET—deft. Carnival's to reply memo. in sup. of s/j.
May 26	—	Ent. rec.'d letter from pltfs. cnsl. striking cross-mot. for s/j & req. cross mot. be treated as pltf's response to deft's mot. for s/j.
Jun 25	22	ORDER—granting defts' mot. for s/j of dismissal. c to c

DATE	NR.	PROCEEDINGS
1986		
	23	JUDGMENT—entered 6-25-87 deft's mot. for s/j dismissal is granted, this action is dismissed. c to c
Jul 24	24	NOTICE OF APPEAL—pltf's from order ent 6/25/87.
Jul 27	—	Mailed appeal packet to CCA. Cert of Record included.

(2) Chronology of Proceedings In Other Courts

Dec. 12, 1988	Opinion issued by U.S. Court of Appeals for the Ninth Circuit
Mar. 28, 1989	Defendant submits petition for rehearing with suggestion for rehearing en banc
Apr. 27, 1989	Order issued by Ninth Circuit withdrawing previous opinion and certifying question to Supreme Court of the State of Washington
Dec. 7, 1989	Opinion issued by Supreme Court of the State of Washington answering certified question
Feb. 22, 1990	Amended opinion issued by Ninth Circuit
Apr. 23, 1990	Motion of defendant-appellee for stay of mandate to permit filing of petition for writ of certiorari granted by Ninth Circuit

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In Admiralty

Case No. ———

EULALA SHUTE and RUSSEL SHUTE,
husband and wife,
Plaintiff,

v.

CARNIVAL CRUISE LINES,
a foreign corporation,
Defendant.

COMPLAINT FOR PERSONAL INJURIES

Plaintiffs allege as follows:

I.

JURISDICTION

This is an admiralty and maritime action pursuant to Rule 9(h) of the Federal Rules of Civil Procedure. Jurisdiction is vested in the court pursuant to 28 U.S.C. Section 1333.

II.

Plaintiffs are residents of the County of Snohomish, State of Washington and are husband and wife. Defendant is a foreign corporation whose principal place of business is Miami, Florida. At all times relevant hereto, it was doing business in the Western District of Washington.

III.

Defendant Carnival Cruise Lines is the owner and operator of the vessel M/V TROPICALE. The M/V TROPICALE is a passenger vessel operating out of United States ports. Defendant Carnival Cruise Lines is a common carrier of passengers for hire. On or about March 27, 1986 plaintiffs purchased tickets for travel onboard the M/V TROPICALE at Smokey Point Travel, in Arlington, Washington. Smokey Point Travel is an authorized ticketing agent for defendant Carnival Cruise Lines. All fees owing for passage were paid by plaintiffs.

IV.

On or about April 13, 1986 plaintiffs boarded the M/V TROPICALE at the Port of Los Angeles for a one week cruise. On Thursday, April 15, 1986 plaintiff Eulala Shute elected to participate in a tour of the vessel's galley which had been advertised in the ship's newspaper. Plaintiff was accompanied by several hundred other passengers. The tour was guided and authorized by the vessel's master and crew. During the tour members of the vessel's crew negligently placed water on the vessel's deck in the galley area, directly in the path of egress of the passengers taking the guided tour. Plaintiff Eulala Shute slipped on the wet deck and was severely injured.

V.

Due to the negligence of the vessel and the negligently unsafe condition of the vessel, plaintiff Eulala Shute was injured, and damaged in an amount to be proven at the time of trial.

VI.

The negligence of the crew had caused a loss of consortium to plaintiff Russel Shute in an amount to be proven at the time of trial.

VII.

After her injury, plaintiff Eulala Shute was treated in an outrageous manner by the crew of the vessel and the crew of the vessel negligently failed to provide her with adequate medical care. As a result of this negligent or intentional outrageous behavior, plaintiffs are entitled to punitive damages in an amount to be proven at the time of trial.

WHEREFORE, plaintiffs pray that the court enter judgment as follows:

1. For damages arising out of the personal injuries of plaintiff Eulala Shute in an amount to be proven at the time of trial.

2. For damages to plaintiff Russel Shute for loss of consortium in an amount to be proven at the time of trial.

3. For punitive damages in an amount to be proven at the time of trial.

4. For reasonable attorneys fees and costs of suit.

5. For such other and further relief as the court deems just.

Dated this 11th day of August, 1986.

WALSH, MARGOLIS & BROUSSEAU

/s/ Gregory J. Wall
GREGORY J. WALL
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

In Admiralty

No. C86-1204D

EULALA SHUTE and RUSSEL SHUTE,
husband and wife,
Plaintiffs,

v.

CARNIVAL CRUISE LINES,
a foreign corporation,
Defendant.

AMENDED ANSWER

Carnival Cruise Lines, Inc. (hereinafter referred to as "Carnival"), for its answer to the complaint of plaintiffs herein (the "Complaint") states and alleges as follows:

1. Defendant Carnival admits the allegations contained in paragraph I of the Complaint.

2. Defendant Carnival admits that it is a foreign corporation with its principal place of business in the United States located at Miami, Florida. Defendant Carnival denies that it was doing business in the Western District of Washington. Defendant Carnival denies the remaining allegations contained in paragraph II of the Complaint for lack of knowledge and information sufficient to form a belief thereto.

3. Defendant Carnival admits that it is a common carrier of passengers for hire and that it is the operator of the M/V TROPICALE which operates out of ports in-

cluding but not limited to United States ports. Carnival also admits that plaintiffs have paid all fees owing for passage on the M/V TROPICALE. Except as so admitted, defendant Carnival denies the allegations contained in paragraph III of the Complaint for lack of knowledge and information sufficient to form a belief thereto.

4. Defendant Carnival admits that plaintiffs boarded the M/V TROPICALE at the port of Los Angeles on or about April 13, 1986 for a one week cruise. Defendant Carnival admits that plaintiff Eulala Shute participated in a guided tour of the TROPICALE's galley while accompanied by other passengers. Except as so admitted, defendant Carnival denies the allegations contained in paragraph IV of the Complaint.

5. Defendant Carnival denies the allegations contained in paragraph V of the Complaint.

6. Defendant Carnival denies the allegations contained in paragraph VI of the Complaint.

7. Defendant Carnival denies the allegations contained in paragraph VII of the Complaint.

AFFIRMATIVE DEFENSES

Defendant Carnival alleges the following affirmative defenses to the Complaint:

First Affirmative Defense

8. Plaintiffs fail to state a cause of action against defendant Carnival upon which relief can be granted.

Second Affirmative Defense

9. Carnival is a foreign corporation which is not doing business in the State of Washington and, therefore, this Court lacks jurisdiction over the person of defendant Carnival.

Third Affirmative Defense

10. The Western District of Washington is an inconvenient forum for the maintenance of this lawsuit and it should therefore be dismissed.

Fourth Affirmative Defense

11. Plaintiffs were allowed passage on board the M/V TROPICALE pursuant to a passenger ticket contract with defendant Carnival (the "Passenger Ticket Contract"), which governs the plaintiffs' and defendant's respective rights and liabilities. Defendant Carnival claims the benefit of all defenses, limitations of liability, and clauses contained in the Passenger Ticket Contract.

Fifth Affirmative Defense

12. The Passenger Ticket Contract at paragraph 8 requires that all lawsuits brought against defendant Carnival must be filed with a court located within the State of Florida. Therefore, this court lacks jurisdiction over the person of defendant Carnival.

Sixth Affirmative Defense

13. Defendant Carnival disclaims any and all liability to plaintiffs pursuant to paragraph 4 of the Passenger Ticket Contract.

Seventh Affirmative Defense

14. Plaintiffs' physical condition prior to the events alleged in the Complaint was the sole and proximate cause of plaintiffs' injuries and the damages claimed herein.

Eighth Affirmative Defense

15. Plaintiffs' injuries and plaintiffs' damages, if any, were proximately caused by plaintiffs' comparative or contributory negligence.

Ninth Affirmative Defense

16. Plaintiffs' injuries and damages, if any, are not actionable because plaintiffs voluntarily and knowingly consented to the situation which caused the injuries alleged by plaintiffs, if in fact they occurred.

WHEREFORE, defendant Carnival prays:

1. That the Complaint of plaintiffs be dismissed;

2. That Carnival be awarded its costs and disbursements and attorneys' fees incurred in the defense of this action; and

3. That the Court award Carnival such other and further relief as may be deemed just and proper.

DATED this 9th day of December, 1986.

BOGLE & GATES

/s/ Jonathan Rodriguez-Atkatz
JONATHAN RODRIGUEZ-ATKATZ
Attorneys for Defendant
Carnival Cruise Lines, Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C86-1204

EULALA SHUTE and RUSSEL SHUTE,
husband and wife,
Plaintiffs,

v.

CARNIVAL CRUISE LINES,
a foreign corporation,
Defendants.

DECLARATION OF EULALA SHUTE

I EULALA SHUTE, state as follows:

1. I am one of the plaintiffs in the above captioned action.

2. I make these statements from my own personal knowledge.

3. On or about March 27, 1986 my husband and I purchased tickets for a Carnival Cruise Line cruise on the M/V Tropicale.

4. My husband and I sailed from the port of Los Angeles on the M/V Tropicale on April 13, 1986 for a one week cruise to Puerta Vallarta and back to Los Angeles.

5. I purchased the cruise tickets through Smokey Point Travel in Arlington, Washington. Also, I received literature from Smokey Point Travel about Carnival Cruise Lines.

6. I had never been on a cruise before or purchased a cruise ticket.

7. Attached is a copy of the ticket for the cruise on the M/V Tropicale issued by Carnival Cruise Lines. The terms on the ticket were pre-printed when I received it. I had no opportunity to negotiate any of the terms found on the ticket.

8. There were at least two other people on the M/V Tropicale from Washington that I met. Their names are Dick and Evelyn Rose.

9. On April 15, 1986 while on a guided tour of the ship's galley, conducted by the ship's crew, I slipped on a wet deck and was severely injured.

10. One witness to my fall, Evelyn Rose, resides in Washington. The other witness resides in California.

11. The physicians and other health care providers who have treated me for injuries incurred from the fall are located in Washington.

12. I am currently in the hospital and cannot travel. I do not know when I will be released.

13. The expense of proceeding with this lawsuit against Carnival Cruise Lines in Florida, including the transportation of witnesses thereto, would be prohibitively burdensome both financially and physically. I doubt that I would be able to pursue my lawsuit if it were transferred to Florida.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 12th day of May, 1987.

/s/ Eulala R. Shute
EULALA SHUTE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

In Admiralty No. C86-1204D

EULALA SHUTE and RUSSEL SHUTE,
husband and wife,
Plaintiffs,

vs.

CARNIVAL CRUISE LINES,
a foreign corporation,
Defendant.

AFFIDAVIT OF PAMELA J. HINRICHS IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

PAMELA J. HINRICHS, being first duly sworn, upon oath, deposes and states:

1. I make this affidavit from my own personal knowledge.

2. I am one of the attorneys for the plaintiffs in the above-captioned matter.

3. On May 11, 1987, I spoke by telephone with the advertising department of the Seattle Times, a prominent daily newspaper in Seattle, Washington.

4. I was informed during that conversation that Carnival Cruise Lines advertises on a regular basis in the

Seattle Times and places advertisements at least in every Sunday edition of the paper.

5. I was further informed that the cost of the advertisements of Carnival Cruise Lines, Inc., is $134.39 per square inch.

6. Attached hereto as Exhibits A, B and C are copies of advertisements I found in Seattle papers on January 4, 1987, May 10, 1987, and May 12, 1987. Exhibits B and C are almost full page advertisements. Exhibits A and B are from the Sunday Seattle Times/Post Intelligencer and Exhibit C is from the Seattle Times Wednesday edition.

7. Attached hereto as Exhibit D is a copy of the brochure of Carnival Cruise Lines, Inc., that the plaintiffs received.

/s/ Pamela J. Hinrichs
PAMELA J. HINRICHS

SUBSCRIBED AND SWORN to before me this 18th day of May, 1987.

/s/ Darleen N. Pace
Notary Public in and for the
State of Washington,
residing at Bellevue

My commission expires:
5/5/89

P. O. Box 526170, Miami, Florida 33152-6170

SHIP

Cabin No.

S P E C I M E N

Passenger Ticket - To Be Presented For Passage

P. O. Box 526170, Miami, Florida 33152-6170

Passenger Booking Number

SHIP

Booking No.	Sailing	Passenger	Adult	Child
Agent	Cabin No.			

SUBJECT TO CONDITIONS OF
CONTRACT ON LAST PAGES

IMPORTANT! PLEASE READ CONTRACT
ON LAST PAGES 1, 2, 3

Passenger's Copy - Not Good For Passage

15

PASSENGER TICKET

TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

1. (a) Whenever the word "Carrier" is used in this Contract it shall mean and include, jointly and severally, the Vessel, its owners, operators, charterers and tenders. The term "Passenger" shall include, the plural where appropriate, and all persons engaging to and/or traveling under this Contract. The masculine includes the feminine.

   (b) The Master, Officers and Crew of the Vessel shall have the benefit of all of the terms and conditions of this contract.

2. This ticket is valid only for the person or persons named hereon as the passenger or passengers and cannot be transferred without the Carrier's consent written hereon. Passage money shall be deemed to be earned when paid and not refundable.

3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

   (b) The passenger admits a full understanding of the character of the Vessel and assumes all risk incident to travel and transportation and handling of passengers and cargo. The Vessel may or may not carry a ship s physician at the election of the Carrier. The fare includes full board, ordinary ship's food during the voyage, but no spirits, wine, beer or mineral waters.

4. The Carrier shall not be liable for any loss of life or personal injury or delay whatsoever wheresoever arising and howsoever caused even though the same may have been caused by the negligence or default of the Carrier or its servants or agents. No undertaking or warranty is given or shall be implied respecting the seaworthiness, fitness or condition of the Vessel. This exemption from liability shall extend to the employees, servants and agents of the Carrier and for this purpose this exemption shall be deemed to constitute a Contract entered into between the passenger and the Carrier on behalf of all persons who are or become from time to time its employees, servants or agents and all such persons shall to this extent be deemed to be parties to this Contract.

5. The Carrier shall not be liable for losses of valuables unless stored in the Vessel's safety depository and then not exceeding $500 in any event.

6. If the Vessel carries a surgeon, physician, masseuse, barber, hair dresser or manicurist, it is done solely for the convenience of the passenger and any such person in dealing with the passenger is not and shall not be considered in any respect whatsoever, as the employee, servant or agent of the Carrier and the Carrier shall not be liable for any act or omission of such person or those under his orders or assisting him with respect to treatment, advice or care of any kind given to any passenger.

   The surgeon, physician, masseuse, barber, hair dresser or manicurist shall be entitled to make a proper charge for any service performed with respect to a passenger and the Carrier shall not be concerned in any way whatsoever in any such arrangement.

7. The Carrier shall not be liable for any claims whatsoever of the passenger unless full particulars thereof in writing be given to the Carrier or their agents within 185 days after the passenger shall be landed from the Vessel or in the case the voyage is abandoned within 185 days thereafter. Suit to recover any claim shall not be maintainable in any event unless commenced within one year after the date of the loss, injury or death.

8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

9. The Carrier, in arranging for the service called for by all shore feature coupons or shore excursion tickets, acts only as agent for the holder thereof and assumes no responsibility and in no event shall be liable for any loss, damage, injury or delay to or of said person and/or baggage, property or effects in connection with said services, nor does Carrier guarantee the performance of any such service.

10. Each fully paid adult passenger will be allowed an unlimited amount of baggage free of charge. Baggage means only trunks, valises, satchels, bags, hangers and bundles with their contents consisting of only such wearing apparel, toilet articles and similar personal effects as are necessary and appropriate for the station in life of the passenger and for the purpose of the journey.

11. No tools of trade, household goods, presents and/or property of others, jewelry, money, documents, valuables of any description including but not limited to such articles as are described in Section 4281 Revised Statute of the U.S.A. (46 USCA § 181) shall be carried except under and subject to the terms of a special written contract or Bill of Lading entered into with the Carrier prior to embarkation upon application of the passenger and the passenger hereby warrants that no such articles are contained in any receptacle or container presented by him as baggage hereunder, and if any such article or articles are shipped and the passenger's baggage in breach of this warranty no liability for negligence, gross or ordinary, shall attach to the Carrier for any loss or damage thereto.

12. It is stipulated and agreed that the aggregate value of each passenger's property under the Adult ticket does not exceed $100.00 (half ticket: $50.00) and any liability of the Carrier for any cause whatsoever with respect to said property shall not exceed such sum, unless the passenger shall in writing, delivered to the Carrier prior to embarkation, declare the true value thereof and pay to the Carrier prior to embarkation a sum (in U.S. Dollars) equal to 5% of the excess of such value, in which event the Carrier's liability shall be limited to the actual damages sustained to the property but not in excess of the declared value.

13. The Vessel shall be entitled to leave and enter ports with or without pilots or tugs, to tow and assist other vessels in any circumstances to return to or enter any port at the Master's discretion and for any purpose and to deviate in any direction or for any purpose from the direct or usual course, all such deviations being considered as forming part of and included in the proposed voyage.

14. If the performance of the proposed voyage is hindered or prevented) or in the opinion of the Carrier or the Master is likely to be hindered or prevented) by war, hostilities, blockade, ice, labor conflicts, strikes on board or ashore, Restraint of Rulers or Princes, breakdown of the Vessel, congestion, docking difficulties, or any other cause whatsoever, or if the Carrier or the Master considers that for any reason whatsoever, proceeding to, attempting to enter, or entering or remaining at the port of passenger's destination may expose the Vessel to risk or loss or damage or be likely to delay her, the passenger and his baggage may be landed at the port of embarkation or at any port or place at which the Vessel may call when the responsibility of the Carrier shall cease and this contract shall be deemed to have been fully performed, or if the passenger has not embarked the Carrier may cancel the proposed voyage without liability to refund passage money or fares paid in advance.

15. The Carrier and the Master shall have liberty to comply with any orders, recommendations or directions whatsoever given by the Government of any nation or by any Department thereof or by any person acting or purporting to act with the authority of such Government or Department or by any Committee or person having under the terms of the War Risks Insuranace on the Vessel the right to give such orders, recommendations or directions, and if by reason of and in compliance with any such orders, recommendations or directions anything is done or is not done the same shall not be deemed a deviation or a breach of this Contract. Disembarkation of any passenger or discharge of his baggage in accordance with such orders, recommendations or directions shall constitute due and proper fulfillment of the obligations of the Carrier under this Contract.

16. (a) The Carrier shall not be liable to make any refund to passengers in respect of lost tickets or in respect of tickets wholly or partly not used by a passenger.

   (b) If for any reason whatsoever the passenger is refused permission to land at the port of disembarkation or such other ports as is provided for in Clauses 14 and 15 hereof, the passenger and his baggage may be landed at any port or place at which the Vessel calls or be carried back to the port of embarkation and shall pay the Carrier full fare according to its tariff in use at such time for such further carriage, which shall be upon the terms herein contained.

17. The Carrier and the Vessel shall have a lien upon all baggage, money, motor cars and other property whatsoever accompanying the passenger and the right to sell the same by public auction or otherwise for all sums whatsoever due from the passenger under this contract and for the costs and expenses of enforcing such lien and of such sale.

18. The passenger or if a minor his parent or guardian shall be liable to the Carrier and to the Master for any fines or penalties imposed on the Carrier by the authorities for his failure to observe or comply with local requirements in respect of immigration, Customs and Excise or any other Government regulations whatsoever.

19. No passenger shall be allowed to bring on board the Vessel Weapons, Firearms, Ammunition, Explosives or other dangerous goods without written permission from the Carrier.

20. The Carrier shall have liberty without previous notice to cancel at the port of embarkation or at any port this Contract and shall thereupon return to the passenger, if the Contract is cancelled at the port of embarkation, his passage money, or, if the Contract is cancelled later, a proportionate part thereof.

21. The passenger warrants that he and those traveling with him are physically fit at the time of embarkation. The Carrier and Master each reserves the right to refuse passage to anyone whose health or welfare would be considered a risk to his own well-being or that of any other passenger.

22. Should the Vessel deviate from its course due to passenger's negligence, said passenger or his estate shall be liable for any related costs incurred.

23. The Carrier reserves the right to increase published fares without prior notice. In the event of an increase, the passenger has the option of accepting the increased fare or cancelling reservations without penalty.

24. In addition to all of the restrictions and exemptions from liability provided in this Contract the Carrier shall have the benefit of all Statutes of the United States of America providing for limitation and exoneration from liability and the procedures provided thereby, including but not limited to Sections 4282, 4282A, 4283, 4284, 4285 and 4286 of the Revised Statues of the United States of America (46 USCA Sections 182, 183, 183b, 184, 185 and 186); nothing in this Contract is intended to nor shall it operate to limit or daprive the Carrier of any such statutory limitation of or exoneration from liability.

25. Should any provision of this Contract be contrary to or invalid by virtue of the law of any jurisdiction or be so held by a Court of competent jurisdiction, such provision shall be deemed to be severed from the Contract and of no effect and all remaining provisions herein shall be in full force and effect and constitute the Contract of Carriage.

No. 89-1647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, dated February 22, 1990, is reported at 897 F.2d 377 and is reproduced at pages 1a-24a of the Appendix to the Petition for Certiorari. The original opinion of the court of appeals, dated December 12, 1988, is reported at 863 F.2d 1437 and reproduced at Pet. App. 25a-48a. The order of the court of appeals withdrawing the original opinion and certifying a question to the Supreme Court of Washington is reported at 872 F.2d 930 and reproduced at Pet. App. 49a. The opinion of the Washington Supreme Court on the certified question is reported at 113 Wash. 2d 763 and 783 P.2d 78 and reproduced at Pet. App. 50a-59a. The order and judgment of the United States District Court for the

Western District of Washington, dated June 25, 1987, are not reported and are reproduced at Pet. App. 60a-65a.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1990. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the due process clauses of the Fifth and Fourteenth Amendments; two provisions of the Limited Liability Act, 46 U.S.C. §§ 183b & 183c; 28 U.S.C. §§ 1404(a) & 1406(a); Rule 4 of the Federal Rules of Civil Procedure; and the Washington long-arm statute, Wash. Rev. Code Ann. § 4.28.185. These materials are reprinted at Pet. App. 66a-71a.

STATEMENT OF THE CASE

This case is a tort action against an out-of-state corporation for personal injuries occurring on an ocean cruise. The action was brought under the admiralty and maritime jurisdiction of the federal courts, 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h).

Respondents Eulala and Russel Shute filed this suit in the United States District Court for the Western District of Washington, seeking to recover damages for injuries allegedly occurring when Mrs. Shute slipped and fell during a seven-day cruise on the M/V TROPICALE from Los Angeles to Puerto Vallarta, Mexico. Pet. App. 2a-3a. The fall occurred in international waters off the coast of Mexico, while Mrs. Shute was on a guided tour of the ship's galley. *Id.* Respondents are residents of Washington State. Pet. App. 2a.

The TROPICALE is operated by Petitioner Carnival Cruise Lines, Inc., a Panamanian corporation with its

principal place of business in Miami, Florida.[1] Pet. App. 2a. The courts below found that Carnival's sole activities in Washington State consisted of soliciting business by advertising in local newspapers, providing brochures and seminars for travel agents, and paying a 10 percent commission to travel agents. *Id.* The courts below found that Carnival owned no property in Washington, maintained no office or bank account in Washington, paid no business taxes in Washington, was not registered to do business in Washington, and did not operate ships that called at Washington ports. *Id.* In 1985 and 1986, Carnival's revenues from residents of Washington were 1.29 and 1.06 percent, respectively, of its total revenues. Pet. App. 7a.

Respondents purchased their tickets from Carnival through their local travel agency. Carnival issued the tickets in Florida upon receipt of full payment there and sent the tickets to respondents in Washington. Pet. App. 2a.

The face of the passenger's copy of the ticket contract contained the following statements printed prominently in the lower left-hand corner:

> SUBJECT TO CONDITIONS OF
> CONTRACT ON LAST PAGES
>
> **IMPORTANT!** PLEASE READ CONTRACT
> ← ON LAST PAGES 1, 2, 3

J.A. 16.[2]

The same page contained the following statement on the lower right-hand corner:

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[1] Carnival Cruise Lines, Inc., has no parent company or subsidiary (other than wholly-owned subsidiaries) to be listed pursuant to Rule 29.1.

[2] The specimen passenger ticket reproduced in the Joint Appendix is identical to the tickets received by respondents and is reproduced at its original size. The original is in the record as an exhibit to Declaration of Eulala Shute, CR 18.

> The provisions on the reverse hereof are
> Incorporated as though fully rewritten

Id.

Beginning on the reverse of the passenger's copy, the ticket contained the terms of the passage contract. The following caption appears at the beginning of the contract terms:

> TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

J.A. 16.

Paragraph 3(a) of the contract provides as follows:

> The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

Id.

The contract includes the following forum selection clause at paragraph 8:

> It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.

Id.; Pet. App. 3a.

Respondents filed this suit in the United States District Court for the Western District of Washington and served Carnival with a summons pursuant to the Washington long-arm statute, Wash. Rev. Code Ann. § 4.28.185, as provided by Rule 4(e) of the Federal Rules of Civil Procedure.[3] Pet. App. 4a-5a. Carnival moved

[3] Respondents' complaint is reproduced at J.A. 4-6. Petitioner's amended answer is reproduced at J.A. 7-10.

for summary judgment dismissing the case for lack of personal jurisdiction or on the basis of the forum selection clause. Carnival alternatively sought transfer to the United States District Court for the Southern District of Florida. Pet. App. 3a.

The Honorable Carolyn R. Dimmick, United States District Judge for the Western District of Washington, granted Carnival's motion for summary judgment and dismissed the case for lack of personal jurisdiction. Pet. App. 60a-65a. The district court held that Carnival did not have sufficient contacts with the forum state to support the exercise of long-arm jurisdiction consistent with the due process clause of the Fourteenth Amendment. Pet. App. 64a. The district court found that personal jurisdiction was lacking because Carnival "did not purposefully avail itself of the benefits and protections of Washington law" through its contacts with that state, Pet. App. 63a, and because the action "did not 'arise out of' or 'result from' " those contacts, Pet. App. 64a. The district court did not consider the effect of the forum selection clause in the ticket passage contract. Pet. App. 60a.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed in an opinion authored by the Honorable Betty B. Fletcher and joined by Circuit Judges Robert Boochever and Stephen S. Trott.[4] Pet. App. 25a-48a. The court of appeals agreed with the district court that Carnival's activities relating to the forum state were not sufficient to support the exercise of general *in personam* jurisdiction. Pet. App. 30a-31a. The court of appeals held, however, that defendant had purposefully availed itself of the laws of Washington, Pet. App. 31a-34a, that respondent's claim "arose out of" Carnival's advertising and promotional activities directed at the forum state, Pet. App. 34a-41a, and that the exercise of jurisdiction would be reasonable, Pet. App. 41a-

[4] Appellate jurisdiction was based on 28 U.S.C. § 1291.

44a. The court of appeals found that Carnival was consequently subject to the exercise of "specific" *in personam* jurisdiction in Washington State. Pet. App. 44a.

At the request of the parties,[5] the court of appeals also decided whether the forum selection clause in the ticket contract was enforceable. The court of appeals noted that this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*") established that forum selection clauses are presumptively valid. Pet. App. 45a. The court of appeals held, however, that the clause here was not enforceable because the provision was not freely bargained for, Pet. App. 46a, and because requiring respondents to sue in Florida would effectively deprive them of their day in court, Pet. App. 47a-48a.

After Carnival filed a timely petition for rehearing with suggestion for rehearing *en banc*, the court of appeals withdrew its opinion and certified to the Washington Supreme Court the question of whether the Washington long-arm statute conferred personal jurisdiction over Carnival for the claim in this case.[6] Pet. App. 49a. The Supreme Court of Washington held that the state long-arm statute extended as far as permitted by the due process clause and, relying upon the withdrawn opinion of the court of appeals, held that assertion of personal jurisdiction in the present case would not violate due process. Pet. App. 58a-59a. The court of appeals then issued an amended opinion, reaching the same conclusions as its original opinion. Pet. App. 1a-24a.

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[5] Pet. App. 45a n.6.

[6] This question was apparently certified because a recent decision by an intermediate appellate court in Washington had held there was no long-arm jurisdiction on similar facts. *Banton v. Opryland U.S.A., Inc.*, 53 Wash. App. 409, 767 P.2d 584 (1989). *See* Pet. App. 51a-52a.

SUMMARY OF ARGUMENT

1. The cause of action here did not "arise out of or relate to" defendant's activities in the forum state, as required for the exercise of specific jurisdiction. Rather, the cause of action arose out of allegedly negligent conduct by defendant outside the forum state. The "but for" standard announced in this case by the court of appeals would dramatically, and improperly, expand the availability of personal jurisdiction over non-resident defendants who do not engage in continuous and systematic activities in the forum state.

2. If the forum state can exercise personal jurisdiction, then the forum selection clause in the ticket contract should be enforced, and the action dismissed or transferred to the contractual forum. The clear consensus of the courts of appeals, except the court of appeals in this case, is that a contractual condition in a ticket is *prima facie* valid if the ticket reasonably communicates to the passenger the existence of additional conditions and directs the passenger's attention to those conditions. The tickets involved here did so with prominent notices to the plaintiffs.

Under *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*"), the forum selection clause is valid. The focus of the court of appeals on whether the clause was "freely bargained for" disregards commercial realities and also fails to take into account this Court's treatment of pre-printed contracts in its recent arbitration cases. In basing its decision to strike down the clause on "public policy" grounds, the court of appeals improperly disregarded the limited reach of the relevant statutory provisions.

3. Proper resolution of the two issues in this case will have the incidental effect of promoting judicial efficiency by increasing the predictability of forum selection and reducing the need for preliminary litigation over that subject.

ARGUMENT

I. THE DISTRICT COURT LACKS *IN PERSONAM* JURISDICTION BECAUSE THE CAUSE OF ACTION DOES NOT "ARISE OUT OF OR RELATE TO" ANY ACTIVITIES OF DEFENDANT IN THE FORUM STATE

Under Rule 4(e) of the Federal Rules of Civil Procedure, amenability to service in this admiralty case depends upon the permissible reach of the Washington long-arm statute. *See Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97, 103-05 (1987). Because the Washington statute has been construed to reach the maximum extent permitted by the Fourteenth Amendment, the issue before the Court is whether the assertion of *in personam* jurisdiction in this case satisfies the requirements of the Due Process Clause. *See* Pet. 13 & n.14. This Court's decisions provide that the issue must be decided by determining whether respondents' action in negligence, seeking damages for injuries allegedly sustained during a slip and fall on a ship located in international waters, arises out of or relates to Carnival's solicitation efforts in Washington. Petitioner respectfully submits that *in personam* jurisdiction cannot be maintained under the facts presented because Carnival's limited contact with Washington is of no substantive relevance to the cause of action.

A. The Due Process Clause Requires A Substantive Connection Between The Cause Of Action And A Defendant's Activities In The Forum State To Support An Exercise Of Specific Jurisdiction

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and subsequent cases, this Court has held that the Due Process Clause of the Fourteenth Amendment imposes significant limits on the ability of states to employ long-arm statutes to assert jurisdiction over non-

resident defendants. The defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (citations omitted).

Indeed, although constitutional limitations on personal jurisdiction are associated today with the Due Process Clause of the Fourteenth Amendment, this Court considered the validity of state court jurisdiction even before the advent of the Fourteenth Amendment. *See Burnham v. Superior Court*, 110 S. Ct. 2105, 2109-10 (1990); *D'Arcy v. Ketchum*, 52 U.S. 174, 11 How. 165 (1850). The Court held in *D'Arcy* that the decision of a state court made without jurisdiction was not entitled to recognition under the Full Faith and Credit Clause, noting that such a proceeding had historically been "deemed an illegitimate assumption of power, and resisted as mere abuse." *Id.* at 184. When the Court considered the issue again in *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873), it did so without referring to the Fourteenth Amendment, then in effect; rather, the Court observed:

> Every independent government . . . is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But, in the exercise of this power, no government, if it desires extraterritorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society.

Id. at 469 (quoting *Mackay v. Gordon*, 34 N.J. 286 (1870)).

The Court has recognized that constitutional limits on personal jurisdiction not only protect individual rights, but also "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-*

Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). "The sovereignty of each State . . . implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* at 293. As the Court explained two years later in *Insurance Corp. of Ireland v. Companie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982), federalism is not an independent basis for denying personal jurisdiction where a particular defendant has waived its right to object. A state's improper exercise of jurisdiction over an out-of-state defendant is, however, an infringement against both the party and the defendant's state, much as the improper exercise of jurisdiction by a foreign nation over a U.S. citizen would violate both the rights of the citizen and the sovereignty of the United States.[7]

Therefore, it is important for courts resolving questions of personal jurisdiction to consider not simply the convenience of the parties, but also the legitimacy of a state's interest in adjudicating the dispute.[8] The reasonableness required by the Due Process Clause "is not the reasonableness of the burden but the reasonableness of the particular State's imposing it."[9] For example, a defendant might find it less burdensome to litigate in an out-of-state court just across the border than in a more distant court within his own state; yet, if the defendant does not have minimum contacts with the foreign state,

[7] The Court in *D'Arcy*, in fact, relied on "the well-established rules of international law" in holding that a state need not give full faith and credit to the prior proceedings of a state lacking jurisdiction. 52 U.S. at 184.

[8] *See generally* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. Ct. Rev. 77, 84-86; Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689 (1987).

[9] Brilmayer, *supra* note 8, at 85.

then that state lacks jurisdiction, while the defendant's state of residence unquestionably has it. The "convenient" sovereign is not necessarily the legitimate one.

In determining whether "minimum contacts" exist so as to permit an assertion of jurisdiction, this Court has distinguished "general" and "specific" *in personam* jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn. 8, 9 (1984); *Calder v. Jones*, 465 U.S. 783, 787 (1984). When the cause of action does not arise out of or relate to the defendant's activities in the forum state, those activities must be sufficiently continuous and systematic to make the assertion of *in personam* jurisdiction reasonable; if they are, then the forum state can exercise general jurisdiction over the defendant notwithstanding the lack of a connection between the activities and the cause of action. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952).[10]

On the other hand, "specific" jurisdiction can be asserted despite a lesser showing of contacts with the forum state, so long as "the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) and *Helicopteros*, 466 U.S. at 414). In cases involving specific jurisdiction, "the Court has said that a 'relationship among the defendant, the forum, and the litigation' is

[10] It has been suggested that "general" jurisdiction under long-arm statutes should be confined to corporations, on the theory that continuous and systematic activities by such artificial entities are the equivalent of physical presence within the jurisdiction by a natural person. *See Burnham v. Superior Court*, 110 S. Ct. at 2110 n.1 (opinion of Scalia, J.). In the present case, the court of appeals held that Carnival's contacts with the forum state were not sufficient to support an assertion of general jurisdiction. Pet. App. 6a-7a.

the essential foundation of *in personam* jurisdiction." *Helicopteros*, 466 U.S. at 414 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

Where the availability of specific jurisdiction has been at issue, although this Court has not yet sought to define a bright-line test, it has consistently looked to the substantiality of the connection between the cause of action and the defendant's activities in the forum state. The Court noted in *International Shoe* not only that the in-state activities of the defendant corporation "were systematic and continuous," but also that "[t]he obligation which is here sued upon arose out of those very activities." 326 U.S. at 320. The Court explained that it was the existence of such a connection that justified the assertion of jurisdiction:

> But to the extent that a corporation exercises the privileges of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Id. at 319.

In *Keeton*, the Court noted that the activities of defendant Hustler Magazine, Inc. in the forum state might not have been sufficient to support general jurisdiction, but held that defendant's magazine sales supported jurisdiction over the libel suit, as the suit arose "out of the very activity being conducted, in part," in the state. 465 U.S. at 779-80. *See also Hanson v. Denckla*, 357 U.S. 235, 251-52 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). In rejecting Minnesota's maintenance of *quasi in rem* jurisdiction based on an unrelated insurance policy in *Rush v. Savchuk*, 444 U.S. 320 (1980), the Court pointed out, "The insurance policy is

not the subject matter of the case, however, nor is it related to the *operative facts* of the negligence action." 444 U.S. at 329 (emphasis supplied).

Implicit in the foregoing cases is the assumption that the cause of action and the in-state activity should be sufficiently related to justify fully the application of the forum state's own law to the dispute. Whether or not the forum state actually would apply its own law, specific jurisdiction should be supported by a substantive nexus such that the forum state could legitimately regulate the particular activity leading to the alleged injuries.[11] This link between the state's jurisdiction to regulate, on one hand, and its jurisdiction to adjudicate, on the other, is implied in *International Shoe*, which upheld the exercise of jurisdiction by Washington State courts where the actions were "brought to enforce" obligations arising out of or connected with defendant's in-state activities. 326 U.S. at 319.

B. In This Case, There Is No Substantive Connection Between Defendant's Forum State Activities And The Cause Of Action

The court below acknowledged that it would have found jurisdiction lacking if it had employed the standard adopted by some other circuits, which had held that a tort action against a provider of transportation or accommodation, based on an accident occurring during travel in another state, does not "arise out of" the business solicitation or contracting in the plaintiff's home state. Pet. App. 10a-12a. The court stated that if it had employed the more stringent standard, "we would find that her injuries arose out of the negligent failure to maintain a safe passageway through the galley of the TROPICALE," Pet. App. 12a, not out of any activities of defendant in

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[11] *See* Stein, *supra* note 8, at 703, 754-56. In the present case, of course, federal rather than state law applies, but the same kind of analysis is required because Rule 4(e) incorporates state law.

Washington State. The court instead announced the adoption of a "but for" standard, however. Pet. App. 15a-17a. The court of appeals held that "but for" Carnival's promotional and advertising activities in the State of Washington, Mrs. Shute would not have taken the cruise on which she was injured, and that her action therefore "arose out of" the promotional and advertising activities. Pet. App. 17a.

Petitioner submits that the Ninth Circuit should have followed the approach of a majority of the circuits and states on this issue [12] and held that the action, based on out-of-state personal injuries, did not arise out of or relate to defendant's in-state solicitation. No element of Respondents' cause of action is based upon Carnival's contact with Washington; the presence or absence of advertising by Carnival in Washington is immaterial to the success of Respondents' claim.

This case is unlike those such as *Burger King* and *McGee*, in which a contract dispute "grew directly out of 'a contract which had a *substantial* connection with that State.'" *Burger King*, 471 U.S. at 479 (quoting *McGee*, 355 U.S. at 223) (emphasis in original). Here, as in *Helicopteros*, the injury did not occur in the forum state, nor did any aspect of the alleged negligence. If the ticket contract between Carnival and plaintiffs is said to be the result of Carnival's solicitation activities in Washington, the cause of action nonetheless does not arise out of or relate to those activities. Plaintiffs are suing in tort, not on the contract.[13] Plaintiffs allege that "members of the vessel's crew negligently placed water on the vessel's deck in the galley area," J.A. 5, and that "the crew of the

[12] *See also* Pet. 10 n.9 (collecting authorities).

[13] Not only is the requirement of due care imposed by tort law, but federal admiralty law prohibits any contractual derogation from that standard. *See* 46 U.S.C. § 183c (prohibiting contract clauses that purport to relieve the carrier of liability for negligence leading to loss of life or bodily injury).

vessel negligently failed to provide her with adequate medical care," J.A. 6. Plaintiffs sought "damages *arising out of the personal injuries* of Eulala Shute" and for Mr. Shute's "loss of consortium." *Id.* (Emphasis added.)

Although Washington State has the authority to regulate advertising by cruise lines within its borders, for example, it has no authority to regulate the safety of premises outside its territory. The Ninth Circuit's decision, however, permits Washington State to employ its authority over in-state solicitation to create long-arm jurisdiction over a lawsuit concerning allegedly unsafe conditions outside Washington—conditions that would otherwise not be subject to Washington's control.

C. The Test Of "But For" Causation Adopted By The Ninth Circuit Is Open-Ended And Unworkable

The Ninth Circuit suggested that a "but for" standard "preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum," Pet. App. 16a. Yet, because the Ninth Circuit's "but for" standard requires merely "*some* nexus," not a substantive nexus, the actual reach of the standard is all but limitless. By greatly expanding the range of cases in which jurisdiction would be available despite a defendant's tenuous contacts with the forum, the "but for" standard comes close to eliminating the distinction between specific and general jurisdiction.

Professor Brilmayer, in criticizing the reach of the "but for" standard, hypothesizes a suit filed in Connecticut for injuries sustained in a Massachusetts auto accident after the defendant had passed *through* Connecticut en route to Massachusetts.[14] But for the trip through Connecticut, defendant would not have been in Massachusetts, and the Massachusetts accident would not have occurred; under the "but for" standard, the cause of action thus

[14] Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444, 1445, 1458 (1988).

"arises out of or relates to" defendant's contacts with Connecticut. Professor Brilmayer notes that the "but for" standard, lacking any requirement of a substantive nexus, can be stretched further still. "For example, it is a 'but for' cause of the accident that the defendant and plaintiff were born: does this mean that specific jurisdiction analysis is appropriate in their states of birth, even if they left them years ago?" [15]

Professor Brilmayer's hypotheticals are not entirely fanciful. In *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976), the Supreme Court of California considered whether due process permitted the courts of that state to hear a claim stemming from a collision in Nevada. The defendant, a Nevada resident, was an interstate truck driver en route to California when the collision occurred south of Las Vegas. 545 P.2d at 264-65. The Court found that California could not exercise general jurisdiction, *id.* at 267, but that it could exercise specific jurisdiction. The Court observed that defendant had long been engaged in trucking between Nevada and California and concluded that "[t]he accident arose out of the driving of the truck, the very activity which was the essential basis of defendant's contacts with this state." *Id.* at 268.

The *Helicopteros* case presents another example of the far-reaching effect of a "but for" test of specific jurisdiction. Defendant, a Colombian corporation, was sued in Texas for injuries stemming from the crash of one of its helicopters in Peru. 466 U.S. at 409-10. Defendant had engaged in negotiations in Texas for the provision of the helicopter services, had purchased helicopters and other items from a Texas company, and had sent pilots, management, and maintenance workers to Texas for training. Payments to defendant for the helicopter services had been drawn upon an account at a Texas bank. Other than those contacts, defendant had no contacts with Texas. *Id.*

[15] *Id.* at 1462.

at 411. This Court did not discuss the availability of specific jurisdiction in that case because all of the parties conceded that the cause of action did not arise out of and was not related to defendant's activities within Texas. *Id.* at 415. The dissenting Justice rejected that view, however:

> Viewed in light of these allegations, the contacts between Helicol and the State of Texas are directly and significantly related to the underlying claim filed by the respondents. The negotiations that took place in Texas led to the contract in which Helicol agreed to provide the precise transportation services that were being used at the time of the crash. Moreover, the helicopter involved in the crash was purchased by Helicol in Texas, and the pilot whose negligence was alleged to have caused the crash was actually trained in Texas.

Id. at 426.

Under this approach, although neither the accident nor the alleged negligence occurred in Texas, *id.* at 412 n.5, that state would have been able to exercise specific jurisdiction on the basis of defendant's incidental contacts with it. The Ninth Circuit in the present case implicitly adopted the approach of the *Helicopteros* dissent in its interpretation of the "arising out of or relating to" requirement. In doing so, the Ninth Circuit failed to require the "'relationship among the defendant, the forum, and the litigation'" that constitutes "the essential foundation of *in personam* jurisdiction." *Helicopteros*, 466 U.S. at 414 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

Apparently in recognition of the difficulties created by its "but for" test, the court of appeals argued that the third part of its test for specific jurisdiction, whether "the exercise of jurisdiction would be unreasonable," adequately protects defendants from suit based on contacts that are "too attenuated." Pet. App. 16a. The factors of reasonableness considered by the court of appeals, apparently

derived from the decision in *Burger King*, 471 U.S. at 477, are

> the extent of purposeful interjection; the burden on the defendant to defend the suit in the chosen forum; the extent of conflict with the sovereignty of the defendant's state; the forum state's interest in the dispute; the most efficient forum for judicial resolution of the dispute; the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and the existence of an alternative forum.

Pet. App. 17a.

The court's "reasonableness" inquiry cannot properly substitute for a requirement of an adequate connection between the cause of action and the forum. Because the court of appeals places the burden of showing unreasonableness on the defendant, Pet. App. 17a, the reasonableness inquiry cannot be substituted for a weakened "arising out of" requirement without also shifting the burden of proof on personal jurisdiction from the plaintiff to the defendant. More important, this Court in *Burger King* indicated that the considerations of reasonableness were to be applied, if at all, *after* there had been a showing of minimum contacts, 471 U.S. at 476.[16] Further, the reasonableness factors are fundamentally different from the minimum contact inquiry in that a lack of minimum contacts entails a lack of personal jurisdiction, *International Shoe*, while reasonableness factors "usually may be accommodated through means short of finding jurisdiction unconstitutional," such as application of different choice-of-law rules. 471 U.S. at 477.

[16] There is some ambiguity in *Burger King* as to this point. Initially, the opinion states that reasonableness factors may be considered "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State," 471 U.S. at 476. Later, however, the opinion states, "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477.

Presumably, the discussion of reasonableness in *Burger King* does not imply that independent consideration should be given to a state's interest in providing a forum for plaintiffs who reside within its borders, making it a possible basis for jurisdiction where defendant's contacts would otherwise not be sufficient. Apart from the resulting infringement on the defendant's due process rights, such an approach would disregard the precisely countervailing interest that other states have in providing a forum for their residents who are *defendants*. As a matter of relative state interests, there is no apparent basis for giving greater weight to the inconvenience of plaintiffs as a class than to that of defendants as a class.

The court of appeals further indicated in dictum that "where a defendant has only one contact with the forum state, a close nexus between its forum-related activities and the cause of the plaintiffs' harm may be required." Pet. App. 15a n.7. Because Carnival "had engaged in significant and continuing efforts to solicit business in the forum state," *id.*, the court found that such a "close nexus" was not required in the present case. The resulting three-tier jurisdictional scheme is wholly without support in this Court's cases. This Court should now make clear that the requirement of a "close nexus" between the in-state activities and the cause of action is not simply to be engrafted onto the requirements for specific jurisdiction in some exceptional cases, but rather is an integral requirement to be applied in all specific jurisdiction cases.

The Ninth Circuit's test, if permitted to stand, would significantly affect members of numerous types of businesses that commonly solicit business from throughout the United States, but do not have national operations in the form of a network of local offices, sales representatives, or other local activities. Members of the travel industry, in particular, typically provide accommodations in a particular location to individuals from throughout the United States. Under the Ninth Circuit's approach, a hotel or carrier could be sued for personal injuries in the home state of any guest, so long as it engages in some adver-

tising or promotional activity there. Thus, for example, a Vermont bed-and-breakfast that advertises in *Yankee* magazine would have to defend, in any state of the country, lawsuits by guests alleging that its premises were negligently maintained.

This test also makes the determination of personal jurisdiction hinge on seemingly irrelevant factual issues. The existence of personal jurisdiction in a case such as this one, for example, would turn on whether plaintiffs could establish that defendant's promotional activities in Washington State were, in fact, the "but for" cause of the decision to purchase the cruise tickets. With respect to many kinds of goods and services, consumers make their purchases based on numerous sources of information, including magazine articles and word of mouth. Here, plaintiffs would have to establish not only that they were aware of the in-state promotion prior to purchasing the tickets, but also that it was a pivotal factor in the decision. The test of substantive relevance urged here and employed by numerous courts of appeals and state supreme courts [17] would focus the jurisdictional inquiry on facts that are also material to the merits of the case.

II. IF JURISDICTION WERE ESTABLISHED, THIS CASE WOULD HAVE TO BE DISMISSED OR TRANSFERRED IN ACCORDANCE WITH THE FORUM SELECTION CLAUSE IN THE TICKET CONTRACT

In a case involving an international commercial agreement, this Court has held that admiralty law establishes a strong presumption in favor of enforcing a forum selection clause. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (*"The Bremen"*). The Ninth Circuit in the present case correctly stated that a ticket for ocean passage is a maritime contract governed by the federal

[17] *See* Pet. 10 n.9 (collecting authorities).

law of admiralty [18] and that *The Bremen* is therefore controlling. *See Shute*, Pet. App. 21a. Despite the presumption mandated by *The Bremen*, the court below found that the clause in this case was unenforceable on two grounds: First, the clause was part of a pre-printed contract and had not been bargained for, and second, enforcing the clause would effectively deprive the Shutes of their day in court. Pet. App. 23a-24a.

The Ninth Circuit's holding is contrary to the federal law of admiralty as delineated by this Court.[19] Its focus on whether the clause was "freely bargained for," Pet. App. 23a, disregards the practical realities of the travel industry and also fails to take into account this Court's treatment of pre-printed contracts in its recent arbitration cases. Finally, in basing its decision on "public policy" grounds, the court below improperly disregarded the limited reach of the relevant statutory provisions, 46 U.S.C. §§ 183b and 183c. The forum selection clause in this case was part of the ticket contract between Carnival and the Shutes and is enforceable under federal admiralty law.

A. The Forum Selection Clause Was A Term Of The Ticket Contract

In *The Majestic*, 166 U.S. 375 (1897), this Court considered the issue of when a term is incorporated into a passenger ticket contract. The carrier in that case issued tickets with a number of conditions on the reverse side, but

[18] *See Archawski v. Hanioti*, 350 U.S. 532 (1956) (steamship passenger contract governed by federal admiralty law); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866) (same).

[19] Even if this were not a maritime case, the validity of the Ninth Circuit's decision would be open to question. With respect to non-admiralty cases, this Court indicated a policy in favor of forum selection clauses in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 31 (1988). *See also id.* at 33 (Kennedy, J., concurring).

with no reference on the front to the existence of additional terms. *Id.* at 376-77. Three passengers sued the carrier for damage to their baggage, and the carrier sought to have its liability limited to £10 as provided by one of the conditions. *Id.* at 376.[20] The Court held that the conditions "were not included in the contract proper, in terms or by reference," and that the passengers were consequently not bound by them. *Id.* at 385.

The courts of appeals, in applying *The Majestic*, have uniformly found conditions in passenger cruise tickets to be incorporated into the contract where the tickets gave reasonable notice to the passengers of the existence of additional terms.[21] Where the ticket did not give sufficiently

[20] Such a condition would now be invalid under 46 U.S.C. § 183c.

[21] *See Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983); *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5 (1st Cir. 1981); *Spataro v. Kloster Cruise, Ltd.*, 894 F.2d 44 (2d Cir. 1990); *Geller v. Holland-America Line*, 298 F.2d 618 (2d Cir.), *cert. denied*, 370 U.S. 909 (1962); *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 484 U.S. 852 (1987); *Carpenter v. Klosters Rederi*, 604 F.2d 11 (5th Cir. 1979); *Miller v. Lykes Bros. S.S. Co.*, 467 F.2d 464 (5th Cir. 1972). In these cases, the courts of appeals enforced the conditions, which required that the passenger notify the carrier of any claims within a specified period or that the passenger bring suit within a specified period.

The decision of the Third Circuit in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 109 S. Ct. 1633 (1989) is instructive. The Third Circuit in *Hodes* enforced a forum selection clause in a pre-printed passenger ticket contract. The Hodeses brought suit in federal district court in New Jersey for claims based on the October 7, 1985 terrorist seizure of the *Achille Lauro*, on which they were passengers. The district court denied the defendants' motion for dismissal, holding the clause unenforceable. The court of appeals reversed. The court of appeals found that the forum selection clause was reasonably communicated to the Hodeses. The court noted that the cover included a statement referring passengers to the contract terms printed inside; the ticket coupons themselves included a statement that they were "subject to the terms, conditions and regulations set out herein." *Hodes*, 858 F.2d at 910. The page of

conspicuous notice of the existence of additional terms, the courts of appeals have found the conditions not to be incorporated.[22]

The tickets issued to the Shutes, unlike those in *The Majestic*, included prominent notices as to the existence of additional printed terms. *See* pp. 3-4 *supra*; J.A. 15-16.[23] Based upon this Court's decision in *The Majestic*, as consistently interpreted and applied by the lower Federal courts for many years, these tickets gave sufficient notice that the forum selection clause was incorporated into the contract for passage.

However, the Ninth Circuit did not evaluate the ticket to determine whether the existence of additional conditions was reasonably communicated. Indeed, the court assumed, *arguendo*, that the Shutes had *actual* notice of the provision. Pet. App. 23a.[24] Apparently, the court made this assumption because it believed that the forum selection clause was incorporated only if the Shutes had actual notice. No other court of appeals has suggested that the party wishing to invoke a condition in a passenger ticket

terms and conditions was captioned, "TERMS AND CONDITIONS OF CONTRACT OF PASSAGE AND BAGGAGE." The forum selection clause was article 31 of 32 articles. *Id.* Because the various statements gave the Hodeses reasonable notice of the clause, the court held that it was incorporated into the contract for passage. *Id.* at 910-11.

[22] *See Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968); *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983).

[23] The specimen passenger ticket reproduced in the Joint Appendix is identical to the tickets received by respondents and is reproduced at its original size.

[24] "Even if we assume that the Shutes had notice of the provision, there is nothing in the record to suggest that the Shutes could have bargained over this language." Pet. App. 23a (footnote omitted).

must demonstrate actual notice, and four circuits have specifically rejected such a contention.[25]

This Court rejected a requirement of actual notice in *New York Central & Hudson River Railway v. Beaham*, 242 U.S. 148 (1916), where it addressed the incorporation of passenger ticket conditions in the railroad context. The Court held that "[i]n the circumstances disclosed, acceptance and use of the ticket sufficed to establish an agreement *prima facie* valid which limited the carrier's liability. Mere failure by the passenger to read matter plainly placed before her could not overcome the presumption of assent." *Id.* at 151-52.

This Court's decisions in *The Majestic* and *Beaham*, along with the uniform consensus of the courts of appeals, indicate that it was unnecessary for the Ninth Circuit in this case to assume actual notice to the Shutes of the forum selection clause. The ticket reasonably communicated the existence of the clause, and thus it must be treated as having been incorporated into the contract for passage.

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[25] *See Geller*, 298 F.2d at 619; *DeNicola*, 642 F.2d at 6; *Hodes*, 858 F.2d at 911-12; *Carpenter*, 604 F.2d at 13 (quoting 80 C.J.S. *Shipping* § 182(5)). The Ninth Circuit itself, in a case involving a limitation of baggage liability in an airline ticket, explicitly adopted the "reasonably communicated" test used in the steamship cases and held the limitation to bind a passenger who had not been shown to have actual knowledge of its terms. *Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1363-65 (9th Cir. 1987).

Where the passengers did not obtain possession of the ticket at all prior to boarding, the courts of appeals have reached varying conclusions. *Compare Muratore v. M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988) (passengers not bound by limitations included in a master ticket held only by the tour group leader) *with Hodes*, 858 F.2d at 911-12 (passengers bound by tickets held for them by the travel club through which they purchased the tickets until they boarded the ship). *Id.* at 912.

B. The Forum Selection Clause Is Presumptively Enforceable As A Matter Of Admiralty Law

In *The Bremen*, the Court upheld a forum selection clause in a maritime contract requiring that any disputes be brought before the London Court of Justice. The contract was for the towing of an oil drilling rig from Louisiana to the Adriatic Sea. After the oil rig was damaged while being towed, it was brought to port in Tampa, Florida. The owner of the rig sued in federal district court in Tampa rather than in the contractual forum. 407 U.S. at 3-4. The district court and the court of appeals rejected the defendant's motion to dismiss or stay based on the forum selection clause, holding that the defendant had not met its burden to show that London would be a more convenient forum than Tampa. *Id.* at 6-7.

This Court reversed. Rather than placing the burden on the defendant, the Court held, "the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15. The Court stated that the plaintiff must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* At least as to "a freely negotiated international commercial transaction," *id.* at 17, the Court held that "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18. It is not enough for the plaintiff to show only that "the balance of convenience is strongly in favor of" a non-contractual forum. *Id.* at 19. Even where "the agreement was an adhesive one," the Court stated that "the party claiming should bear a heavy burden of proof." *Id.* at 17.[26]

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[26] This Court's decision in *Stewart Organization* did not overrule *The Bremen*. *Stewart Organization* held that district courts

The Ninth Circuit in the present case cited *The Bremen* as "the starting point for analysis," Pet. App. 21a, but then briskly distinguished *The Bremen* on two grounds. First, the court stated that "in our view the evidence in this case suggests the sort of disparity in bargaining power that justifies setting aside the forum selection provision." Pet. App. 22a-23a. The court pointed out that "the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis." Pet. App. 23a. Second, the court found that "enforcement of the forum selection clause would be greatly inconvenient to the plaintiffs and witnesses." Pet. App. 24a. Referring to affidavits submitted by the plaintiffs, the court noted that "[t]here is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." *Id.* Consequently, the court held the forum selection clause "unenforceable in these circumstances." *Id.*

We submit that these grounds for distinguishing *The Bremen* are insufficient, as explained below.

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sitting in diversity must decide § 1404(a) transfer motions by the terms of § 1404(a) itself, not by the admiralty law standard of *The Bremen*. *See Stewart Organization*, 487 U.S. at 28.

. In a diversity case such as *Stewart*, the validity of the forum selection clause as a matter of contract law is a question of state rather than federal law. A valid forum selection clause could support a motion to dismiss or transfer under § 1406(a), without regard to the other discretionary factors considered in deciding whether a forum is convenient for purposes of § 1404(a). The only issue before the Court in *Stewart* was a motion to transfer under § 1404(a), which was held to be a procedural issue to be decided as a matter of federal rather than state law. 487 U.S. at 32.

Here, the validity of a contractual forum selection clause is a question of federal admiralty law. As in *The Bremen*, a valid clause is enforceable in its own terms and not as one of many factors in the convenience analysis of § 1404(a). There is no indication that *Stewart* was intended to modify the holding of *The Bremen* in this regard.

C. Enforcement Should Not Be Denied On The Ground That The Ticket Was A Form Consumer Contract

The difference between this case and *The Bremen* that the court of appeals primarily emphasized was that the contract in *The Bremen* was a negotiated contract between commercial parties, while the contract at issue here is a form consumer contract. The Ninth Circuit's reliance on the unbargained-for nature of the provision here should be rejected. Like many consumer contracts, passenger tickets are rarely, if ever, "freely bargained for," nor would it be practical for carriers to engage in such negotiations with every customer.

Indeed, while the Ninth Circuit spoke only of the lack of bargaining over the forum selection clause, the truth is that *no* aspect of the transaction was "freely bargained for" in the Ninth Circuit's apparent sense of the phrase as involving one-on-one haggling. The same is true of most vacation and business travel arrangements made throughout the United States. That fact does not at all imply, however, that the travelers are being "overweened" into acceptance of contracts. The leisure travel industry is far from a monopolistic one in which consumers must either deal with a single firm or forgo life's necessities.

The Ninth Circuit's approach, if upheld, would threaten a variety of form contracts in the maritime context, such as bills of lading and insurance agreements —contracts that shippers, insurers, and other firms may enter into with commercial and noncommercial customers alike. The *Restatement (Second) of Contracts* describes some of the reasons why standard agreements are essential to many kinds of transactions; these reasons are fully applicable to maritime businesses:

> Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can

> be devoted to a class of transactions rather than to details of individual transactions. Legal rules which would apply in the absence of agreement can be shaped to fit the particular type of transaction, and extra copies of the form can be used for purposes such as record-keeping, coordination and supervision. Forms can be tailored to office routines, the training of personnel, and the requirements of mechanical equipment. Sales personnel and customers are freed from attention to numberless variations and can focus on meaningful choice among a limited number of significant features: transaction-type, style, quantity, price, or the like. Operations are simplified and costs reduced, to the advantage of all concerned.

Restatement (Second) of Contracts § 211 comment a (1981).

The *Restatement* further recognizes that it is reasonable to impose upon parties to certain form contracts, including passenger tickets, a duty to read. According to the *Restatement*, some documents

> may serve both contractual and other purposes, and a party may assent to it for other purposes without understanding that it embodies contract terms. He may nevertheless be bound if he has reason to know that it is used to embody contract terms. Insurance policies, *steamship tickets*, bills of lading, and warehouse receipts are commonly so obviously contractual in form as to give the customer reason to know their character.

Id. comment d. (Emphasis added.)

The approach taken by the Ninth Circuit to this provision in a form consumer contract is also difficult to reconcile with this Court's decisions in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). In those cases, the Court upheld arbitration clauses that were incorporated into pre-printed form contracts in transactions between a

brokerage firm and individual customers. The contract provision at issue in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), designating a New York agent for service of process upon Michigan customers, was upheld although it was in a pre-printed contract and was being applied against individuals.

D. The Forum Selection Clause Was Not Unreasonable Or Unjust

In this case, inclusion of the clause in a ticket contract requiring litigation in a particular forum was not an act of overreaching by Carnival. The interstate nature of the travel industry is such that Carnival, like any other provider of sea or air transportation, may carry residents of numerous states on any given trip; a single mishap could lead to the filing of similar or identical claims in courts throughout the country. The forum selection clause is a reasonable means to promote the orderly and efficient resolution of claims that might otherwise have to be litigated in multiple jurisdictions. *See Hodes*, 858 F.2d at 913.[27]

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[27] The issues pertaining to the forum selection clauses in *Hodes* and this case are essentially identical, except that the contractual forum in *Hodes* was Naples, Italy. Having determined that the forum selection clause was reasonably communicated and was thus incorporated into the contract, the court in *Hodes* held that the forum selection clause was enforceable under *The Bremen*. The Third Circuit acknowledged that the contract in *The Bremen* was the product of negotiation between sophisticated businesses, and that the defendants in *Hodes* had a superior bargaining position to the ticket purchasers, but held that the defendants "did not take unfair advantage of that position to 'overween' the Hodeses." *Id.* at 913. The court pointed out that the defendants were contracting with purchasers worldwide and that the ship itself would enter a number of jurisdictions. As a result, the court found, the defendants had a legitimate interest in seeking certainty as to where suit could be brought against them. *Id.*

The Third Circuit also rejected the view that "trial in the contractual forum will be so gravely difficult and inconvenient" that the Hodeses would "for all practical purposes be deprived of

Moreover, the state selected—Florida—is where Carnival has its principal place of business and where many of its cruises arrive and depart. Such a forum bears a logical relationship to the likely location of documents and witnesses; there is no indication that it was chosen to prevent meritorious litigation from being conducted efficiently or fairly.

Plaintiffs' allegations of inconvenience here do not justify invalidating the forum selection clause under *The Bremen*. Although Washington State was the Shutes' preferred forum, there is no reason why the suit could not have been litigated in Florida. The Shutes have not shown why they would have been unable to secure counsel in Florida, based, if necessary, on the sort of contingent fee arrangement that is typical in personal injury litigation. Further, as the Court noted in *The Bremen*, depositions can be used to avoid much of the incremental expense and inconvenience of litigating in the contractual forum. 407 U.S. at 19.[28]

[their] day in court." *Id.* at 916 (*quoting The Bremen*, 407 U.S. at 18). The Hodeses could not show either that they "would face blatant prejudice in the foreign forum" or that litigation in the contractual forum "would be severely impractical." 858 F.2d at 916. In assessing the practicality of litigation in the contractual forum, the Third Circuit stated that the inquiry is not whether the forum is convenient for the plaintiffs, but whether there are circumstances making it impractical for the dispute to be litigated there at all.

[28] In fact, under some circumstances, a tort claimant in admiralty can be required to litigate in a forum not of his choosing even if there is no forum selection clause. The limitation procedures established by 46 U.S.C. § 185 and by Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims permit the vessel owner to bring an action within six months for limitation of his liability. *See generally* 12 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 3251-56 (1973). After the owner has either transferred his interest in the vessel to a court-appointed trustee or deposited the value of his interest in the vessel with the court, together with certain additional amounts, "all claims and proceedings against the owner with respect to the matter in question shall cease." 46 U.S.C. § 185. (A vessel owner would normally bring a limitation action under § 185 only in response to an incident of such magnitude that the owner's liability is expected to exceed the value of the vessel.)

Rule F(9) permits transfer of the § 185 action "[f]or the convenience of parties and witnesses, in the interest of justice." The use of that provision, however, entails a transfer of all the claims against the vessel, not just the ones for which the original forum was inconvenient. Thus, even after a transfer, some claimants may have to litigate in an inconvenient forum. According the vessel owner discretion to choose the forum in which claims will be brought, notwithstanding that the chosen forum may be inconvenient for some claimants, is clearly not repugnant to admiralty law. A contractual forum selection clause serves much the same goals as § 185, by permitting the orderly resolution of claims in a single forum.

In some ways, enforcement of the forum selection clause in this case is more reasonable than the situation in *The Bremen*. The Court assumed in *The Bremen* that the London court would enforce an exculpatory clause in the contract, relieving the defendant of liability, whereas such a clause would be unenforceable under U.S. admiralty law. 407 U.S. at 3 n.2, 8 n.8. There is, of course, no issue as to choice of law in this case; federal admiralty law will govern the Shutes' claim whether brought in Washington or Florida, and U.S. policies against exculpatory clauses will be protected in either forum. Also, unlike the situation in *The Bremen*, the Shutes will be entitled to appeal any erroneous application of U.S. admiralty law within the U.S. federal court system.

By discussing the factors making the enforcement of the forum selection clause reasonable in this case, we do not mean to suggest that the Court should conduct an open-ended balancing of equities. Such an approach would eliminate the predictability that forum selection clauses are intended to achieve. *See* Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev.

291, 358-60 (1988). "Given the broad spectrum of elements that bear on enforceability, litigants have little clue as to which tack any particular court may take in construing a forum-selection clause." *Id.* at 359-60.[29] Also, by requiring that the court in the plaintiff's chosen forum undertake a fact-intensive inquiry into the circumstances, such a test compels the party asserting the forum selection clause to participate in possibly protracted litigation over its enforceability. *Stewart Organization*, 487 U.S. at 33 (Kennedy, J., concurring). Because this litigation takes place in a forum other than the contractual one, the test undermines the precise substantive right that a forum selection clause is intended to grant.

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[29] Professor Mullenix cites *D'Antuono v. CCH Computax Sys., Inc.*, 570 F. Supp. 708 (D.R.I. 1983) to illustrate the wide range of circumstances that courts may find relevant. In applying *The Bremen* to a forum selection clause in a commercial contract dispute, the court in *D'Antuono* set forth a nine-factor test: (1) the identity of the law that governs the contract, (2) the place of execution of the contract, (3) the place where the transactions have been or are to be performed, (4) the availability of remedies in the designated forum, (5) the public policy of the forum state, (6) the location of the parties, the convenience of prospective witnesses, and the accessibility of evidence, (7) the relative bargaining power of the parties and the circumstances surrounding their dealings, (8) the presence or absence of fraud, undue influence, or other circumstances, and (9) the conduct of the parties. The court concluded, "While each of these factors has some degree of relevance and some claim to weight, there are no hard-and-fast rules, no precise formulae. The totality of the circumstances, measured in the interests of justice, will—and should—ultimately control." 570 F. Supp. at 712.

E. The Ninth Circuit's "Public Policy" Analysis Of The Forum Selection Clause Improperly Disregarded 46 U.S.C. §§ 183b And 183c

Two provisions of the Limited Liability Act[30] are relevant to this case. Under 46 U.S.C. § 183b, a carrier cannot employ contract conditions imposing a period of less than six months for the passenger to give notice of a claim or less than one year for a passenger to file suit. Under 46 U.S.C. § 183c, a carrier cannot employ contract conditions "purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants," to limit its liability to its passengers, and cannot employ contract conditions "purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor."

The court below sidestepped the applicability of §§ 183b and 183c. Rather than looking first to the relevant statutes to determine whether they are applicable, the court stated that "[b]ecause we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of [§ 183c] on forum selection agreements." Pet. App. 23a n.12. The court then suggested that, notwithstanding the specific nature of the statutory limitations, the decision of Congress to enact the limitations "exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners" and thereby establishes a requirement that courts undertake an "independent examination of the fairness of this type of contract." *Id.*

Neither § 183b nor § 183c prohibit forum selection clauses. Section 183b is concerned only with time limitation clauses that allow a passenger less than six months

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[30] 46 U.S.C. §§ 181 *et seq.* The statute is also known as the "Limitation Act." The relevant provisions, §§ 183b and 183c, are printed at Pet. App. 66a-68a.

to notify the carrier of a claim or less than a year to file suit. The forum selection clause does not violate that prohibition. The first part of § 183c is concerned only with limitations on the amount of the carrier's liability. The forum selection clause does not limit the amount of Carnival's liability. The second part of § 183c is concerned only with clauses lessening, weakening, or avoiding "the right of any claimant to a trial by court of competent jurisdiction"—*i.e.*, arbitration clauses.[31] The state and federal courts of Florida are courts of competent jurisdiction.

In setting forth these specific limitations on passenger ticket contracts, Congress has impliedly approved clauses that fall outside the scope of the regulatory scheme. Thus, the court below drew precisely the wrong conclusion from Congress's silence as to forum selection clauses. By not providing that those clauses were among the abusive conditions that Congress sought to prohibit in §§ 183b and 183c, the statute lends support to their validity.[32] As this

[31] The text of this provision is consistent with the understanding expressed in the relevant House and Senate committee reports. Both the House and Senate committee reports on the 1936 legislation creating the current § 183c stated that the provision was in response to passenger ticket conditions limiting the owner's liability for negligence or providing that "the question of liability and the measure of damages shall be determined by arbitration." S. Rep. No. 2061, 74th Cong., 2d Sess. 6 (1936); H.R. Rep. No. 2517, 74th Cong., 2d Sess. 6 (1936). This understanding of the second part of § 183c as concerned with arbitration clauses was also uniformly expressed by supporters and opponents of the bill during the House committee hearings on it. *See Safety of Life and Property at Sea: Hearings Before the Comm. on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 20, 36-37, 57, 109, 110, 119 (1936).

[32] In the somewhat analogous context of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300 *et seq.*, the First Circuit has upheld a forum selection clause in a bill of lading that required suit in New York. *See Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974). The court rejected the argument that a forum selection clause in a bill of lading is invalid under 46 U.S.C. § 1303(8) as a limitation of liability. Section 1303(8), like § 183c, nullifies any clause lessening a carrier's liability. The First Circuit declined to infer from that provision either a specific prohibition on forum selection clauses or a general policy in favor of scrutinizing such clauses for lack of fairness.

Where forum selection clauses in bills of lading required suit overseas, several courts of appeals have held that forum selection clauses are invalid as limitations of liability under § 1303(8). *See Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203-04 (2d Cir. 1967); *Union Ins. Soc'y, Ltd. v. S.S. Elikon*, 642 F.2d 721, 724-25 (4th Cir. 1981); *Conklin & Garrett, Ltd. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987); *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989). These courts treated forum selection clauses as limitations of liability on the ground that enforcing the clauses could effectively reduce the liability of the carrier; the foreign courts might apply the controlling law differently than U.S. courts, and the clauses create an obstacle for the plaintiff in bringing suit.

The cases interpreting § 1303(8) in this manner may well have been wrongly decided. Like § 183c, § 1303(8) does not expressly prohibit forum selection clauses, and indeed should be read to approve of such clauses by omission. In *William H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806, 807 (2d Cir. 1955), later overruled by *Indussa*, the Second Circuit rejected the argument that a foreign forum selection clause violated § 1303(8), noting that "if Congress had intended to invalidate such agreements, it would have done so in a forthright manner, as was done in the Canadian [Carriage of Goods by Sea Act]."

Court very recently observed in *Miles v. Apex Marine Corp.*, No. 89-1158 (U.S. Nov. 6, 1990), "'The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.' [*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970).] Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits." Slip op. at 4. Here, the court below was not free to invoke "public policy" and go beyond the statutory requirements for passenger tickets.

III. PROPER RESOLUTION OF THIS CASE WILL PROMOTE THE EFFICIENCY AND FAIRNESS OF THE LEGAL SYSTEM BY MAKING FORUM SELECTION MORE DETERMINATE

Although the two issues in this case are conceptually distinct, they parallel one another in that their proper resolution will have, as an incidental effect, salutary consequences for judicial administration. It is appropriate for the Court to take such consequences into account in deciding these issues. The minimum contacts test for *in personam* jurisdiction serves, in part, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies." *World-Wide Volkswagen*, 444 U.S. at 292. The fact that enforcement of forum selection clauses would promote efficient resolution of controversies, by reducing "uncertainty and possibly great inconvenience to both parties," was also part of the reason for this Court's decision in *The Bremen* to enforce such clauses as a matter of federal admiralty law. 407 U.S. at 13.

Petitioner's position on each of the issues in this case serves judicial efficiency. Both a strict application of the relatedness test for *in personam* jurisdiction and a policy of upholding forum selection clauses contribute to efficiency by increasing the predictability of the forum and outcome of legal disputes. Both doctrines thus assist parties in ordering their primary conduct and in resolving disputes short of litigation.

Some objection may be raised to these doctrines on the ground that they restrict the ability of a plaintiff to select the forum for litigation.[33] However, respect for a plaintiff's choice of forum is properly based upon a desire to minimize the litigation of threshold issues and a recognition that, as the party initiating the suit, the plaintiff

[33] *See, e.g., Helicopteros*, 466 U.S. at 422-23 (Brennan, J., dissenting); *World-Wide Volkswagen*, 444 U.S. at 308, 312-13 (Brennan, J., dissenting).

must make the initial choice of where to file. There is no constitutional basis, or any other basis, for holding that plaintiffs as a class deserve a greater say than defendants in deciding where cases should be litigated. A doctrine that increases the convenience to plaintiffs by maximizing the available alternatives for a plaintiff's choice of forum makes litigation correspondingly less convenient for defendants.[34] Therefore, it does not offend the general policy behind respecting a plaintiff's choice of forum to limit the range of permissible choice through voluntary agreement, as in a forum selection clause, or by employing a substantive relationship standard in applying the minimum contacts test for *in personam* jurisdiction.

Proper limitations on the choice of forum not only increase predictability, but also reduce the ability of plaintiffs to affect the outcome of lawsuits through manipulative forum-shopping. In an admiralty case such as this one, the choice of forum has a limited effect on the outcome because the case will be heard in a federal court that will apply federal admiralty law. This Court's holding on the personal jurisdictional issue, however, will govern diversity cases and state court cases, where the choice of forum may well affect the choice of substantive law. States may skew their choice-of-law analysis to favor their own law, thereby giving plaintiffs the opportunity to obtain more favorable law by bringing suit there.

The Due Process Clause and the Full Faith and Credit Clause restrict the power of a state to apply its own law unless it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice

[34] Of course, a defendant sued in an inconvenient forum can seek a transfer, on *forum non conveniens* grounds. 28 U.S.C. § 1404(a); *Stewart Organization*. However, such threshold litigation is itself burdensome. Moreover, some states do not recognize the *forum non conveniens* doctrine. *See, e.g., Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990).

of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)). Those constitutional restrictions, characterized by the Court as "modest," *Phillips Petroleum*, 472 U.S. at 818, leave the states ample opportunity to require that their own law be applied to disputes in their courts, thus potentially making the outcome of a case turn on the choice of forum. "Being forced to defend in the distant state may be inconvenient and costly, but application of the substantive law of that state could be fatal." [35]

Moreover, even where the forum state does not apply its own law, there is a harm to judicial efficiency. A state court, or even a federal district court, is normally better able to apply the law of the state in which it sits than the law of another state. The parties also have a superior remedy for legal error, or to advocate change in legal doctrine, if they can appeal the decision to appellate courts of the state whose law is at issue. Therefore, although the constitutional limits on assertion of personal jurisdiction and choice of law involve somewhat different considerations, there is a substantial benefit to the judicial system to construe these doctrines so as to minimize the instances in which courts must apply foreign law. There is a similar benefit to enforcing a contractual choice of forum, which is often the state whose law would be applied by contract or otherwise.

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[35] Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 Colum. L. Rev. 960, 989 (1981); *see also* von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. Rev. 279, 308-09 (1983).

Where personal jurisdiction over a defendant for particular conduct is available in numerous states, and where the choice of forum largely dictates the choice of law, the effect is to make the defendant subject not only to the adjudicatory jurisdiction of those states, but also to the regulatory jurisdiction of those states. As a result, a defendant could be subject to differing, and possibly conflicting, standards of care. For example, a hotel owner subject to personal jurisdiction by virtue of business solicitation in a number of states would be subject simultaneously to the various standards of care that would apply in personal injury suits brought in those states.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded to be dismissed for lack of jurisdiction over the person or, in the alternative, dismissed or transferred pursuant to 28 U.S.C. § 1406(a).

Respectfully submitted,

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No. 89-1647

In The

Supreme Court of the United States

October Term, 1990

CARNIVAL CRUISE LINES, INC.,

Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Was the Ninth Circuit Court of Appeals correct in finding that the Petitioner's contacts within the State of Washington and Petitioner's efforts directed at the residents of the State of Washington were sufficient for the constitutional exercise of the Washington Long Arm Statute?

2. Is the forum selection clause printed on a steamship passenger ticket enforceable in the factual context of this case?

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

This case arises from a personal injury in 1986 to Eulala Shute while she and her husband were passengers on a vessel owned by the Respondents, the M/V TROPICALE. Her injury occurred while the vessel was in international waters on a cruise which began and ended in the State of California. J.A. 11. Mrs. Shute was injured when she fell during a conducted tour of the ship's galley. J.A. 11. This action was filed in the United States District

Court for the Western District of Washington, in Admiralty, pursuant to 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. J.A. 4.

The Respondents are residents of the State of Washington and purchased their tickets in the State of Washington from a local travel agency. Res. App. 1. Petitioner required that passengers tender payment to the travel agent prior to receiving their ticket and Petitioner's form ticket was delivered to Respondents, in Washington, by the travel agent. Res. App. 1. The travel agent involved, Lynn Weber, had received promotional material from the Petitioner and had also been trained at seminars conducted by Petitioner within the State of Washington. The travel agent received a ten percent commission for the sale of the ticket package. Res. App. 2. Mrs. Shute received promotional materials prepared by Petitioner from the travel agent. J.A. 11.

Petitioner advertises both nationally and locally in Washington in addition to its seminars and other promotional activities. Res. App. 2. Petitioner admits it receives a portion of its revenues from Washington residents as a result of these promotional and sales activities. See Pet. App. 2a. These sales, 1.29 percent in 1985 and 1.06 percent in 1986, were roughly proportional to the population of Washington. In 1987, Washington's population was approximately 1.7 percent of the population of the United States in 1987. (*1988 World Almanac and Book of Facts*, 588, 732). Petitioner's commercial presence within Washington consisted of the sales of its product in Washington, the purchase of the services of Washington travel agents, promotional seminars within Washington and Petitioner's advertising campaign.

The vessel M/V TROPICALE was operating from California ports at the time this action was commenced. All the witnesses to the accident are either on the vessel, residents of California or residents of Washington, including Respondent's physicians. J.A. 12. The only connection to the State of Florida is that Petitioner, a Panamanian corporation, currently maintains its headquarters in that state. It is unlikely that any person in the corporate headquarters would have information relevant to Respondents' personal injury lawsuit. Respondents contend that it would be much more difficult to recover compensation for their injuries if suit were to be brought in Florida.

The case was initially dismissed by the Honorable Carolyn Dimmick for want of jurisdiction. See Pet. App. 60a-65a. This decision was reversed by the Ninth Circuit Court of Appeals. Their decision, published at 863 F.2d, 1437, is reproduced in Petitioner's Appendix pages 25a-48a. This decision was withdrawn in order to allow the Washington State Supreme Court to answer a question regarding the scope of the Washington State Long Arm Statute, Washington Revised Code § 4.28.185. The Supreme Court's opinion is reproduced in the Petitioner's Appendix.

In that decision, the Washington State Supreme Court affirmed that the "but for" requirement articulated by the circuit court was a correct interpretation of the Washington Long Arm Statute, which requires that the action "arise out of" the transaction of business in the state. See: Washington Revised Code § 4.28.185. The Washington Supreme Court specifically found that the activities of Carnival within the State of Washington, and directed at

the residents of the state of Washington, were sufficient for the constitutional exercise of the Washington State Long Arm Statute. Based upon this decision, which is recorded at 113 Wash. 2d 763, and reproduced in the Petitioner's Appendix, the Court of Appeals reissued its earlier decision. That decision is recorded at 897 F.2d 377 and is reproduced in Petitioner's Appendix.

The Ninth Circuit Court of Appeals also found that the forum selection clause in the passenger ticket was unenforceable as a matter of public policy. The ticket clause in question is one of 25 paragraphs, contained in three pages of very fine print, and attached to the back of the ticket. J.A. 15. The passenger receives the ticket only after payment is made and there is no opportunity to negotiate this, or any other, portion of the ticket. See: J.A. 12. Petitioner admits this to be the case at page 27 of their brief. This portion of the ticket also provides, at paragraph 16, that there are no refunds for unused tickets. It also contains a general exculpatory clause at paragraph 4, which purports to avoid liability for any injury caused by the negligence of the carrier or its employees. Finally, the ticket incorporates several statutes, at paragraph 24, but does not incorporate 46 U.S.C. § 183c. J.A. 15.

The basis of the circuit court's decision was that the clause was not freely bargained for and that enforcement of this clause would effectively deprive Respondents of their day in court, thereby decreasing their right to recover for personal injuries on the vessel. Pet. App. 47a-48a. The Circuit Court did not reach the issue of whether the forum selection clause was unenforceable as a matter of law because of the operation of a federal statute, the Limitation of Liability Act, 46 U.S.C. 183c,

which prohibits ticket clauses which reduce the liability of vessel owners for injuries to passengers.

SUMMARY OF ARGUMENT

1. The exercise of jurisdiction over the Petitioner is consistent with due process and does not offend traditional concepts of fair play and reasonableness. Petitioner has substantial contacts with the state and, by systematically transacting and soliciting business there, it has purposefully availed itself of the benefits of the state for its own economic gain. These contacts are sufficient to confer jurisdiction over Petitioner. Petitioner now asks the Court to impose a new requirement on litigants, that the claim have "substantive relevance" to the activities creating purposeful availment. The prior cases of this Court contain no such requirement, nor does it relate in a logical way to the prior holdings of the Court. If it is reasonable to allow suit against a foreign corporation because of its contacts within the forum, or directed at the forum, the subject matter of the lawsuit should not be required to be identical in nature to the defendant's contacts. While the decisions of this Court do discuss a substantial nexus between the defendant and the forum state, this nexus is satisfied by a sufficient number of purposeful minimum contacts. None of the Court's previous cases require a substantial nexus between the type of contact and the type of injury upon which the suit is based. If this new requirement is adopted, the Court is not only greatly restricting the rights of plaintiffs such as the Respondents, but it is opening the door to endless litigation about the "quality" of claims. A better result is to allow

the courts below to continue to use the standards already established by the Court.

The Washington Supreme Court has determined that the activities of Petitioner within Washington and directed at Washington meet the requirements of the Washington Long Arm Statute. Since that court is the final arbiter of the meaning of Washington statutes, the only remaining question for this Court is the issue of due process. This question is not decided in a vacuum, but in light of modern commercial practice and the state of modern technology. It is not difficult for a corporation such as petitioner to do substantial business in a state without being physically present therein. It is also not unfair to require them to appear and defend a suit which arises out of their successful efforts to make a profit. The "but for" test is simply another way of requiring the action arises out of Petitioner's commercial presence within the state. The same tests of reasonableness and traditional notions of fair play that are currently in use govern the application of a "but for" test.

2. The forum selection clause found in Petitioner's ticket is unenforceable both as a matter of public policy and pursuant to the operation of a federal statute, The Limitation of Liability Act, 46 U.S.C. § 183c. The forum selection clause is designed to thwart injured passengers from bringing suit to recover compensation for their injuries. In the case in which a vessel is located on the west coast of the United States and in which tickets are sold to residents of the west coast, there is no logical basis for a Florida forum. Washington is a logical forum for all parties, since the Respondents and most of the witnesses reside in that state or in nearby California. The Court's

holding in *M/S BREMEN v. Zapata Offshore Co.*, 407 U.S. 1 (1972), which concerned a commercial towing contract between parties of approximately equal bargaining power, invalidates the forum selection clause in this case. The Court recognized that the forum selection clause would not be enforceable in a situation in which one party had "overweening bargaining power" or where it violated either judicial or statutory public policy. It is difficult to imagine a situation more one sided in terms of bargaining power than that presented by the contract in this case. The circuit court was correct in refusing to enforce this contract of adhesion, recognizing that the sole purpose of the clause is to deny the injured passenger his or her day in court. The Petitioner's argument that the clause should be enforced, even if it is unfair, is not well taken. The convenience of one type of business, at the expense of thousands of consumers, is not a valid reason for upholding the forum selection clause.

The Court should also find that this ticket clause violates 46 U.S.C. § 183c since it clearly does limit the right of passengers to recover for injuries received on the ship. This is a remedial statute, and therefore broadly construed to achieve the purpose Congress intended. In this case, Congress intended to prevent shipping companies from evading their obligations to injured passengers. Being broadly construed and worded broadly, the statute does not need to specifically mention forum selection clauses in order to invalidate them.

3. The adoption of an additional test for the exercise of *in personam* jurisdiction, that of "substantive relevance", will not improve judicial efficiency, rather, it will have the opposite effect. The adoption of such a doctrine would

simply provide another tool to defendants for delaying litigation, and would require appellate courts to review numerous factual situations in cases in which the defendant has clearly transacted business in the forum state. Petitioner's arguments regarding choice of law are irrelevant to this action, which is governed by federal maritime law.

ARGUMENT

I. THE DISTRICT COURT HAS *IN PERSONAM* JURISDICTION OVER PETITIONER BECAUSE ITS CONTACTS WITH WASHINGTON ARE SUFFICIENT FOR SPECIFIC JURISDICTION AND BECAUSE THE CAUSE OF ACTION ARISES OUT OF PETITIONER'S CONTACTS WITH WASHINGTON.

Washington's Long Arm Statute permits Washington courts to assert jurisdiction to the fullest extent the due process clause allows. The Washington Supreme Court has already determined that the Respondents' cause of action arises out of the transaction of business in Washington for the purpose of the Washington Long Arm Statute. The remaining issue for this Court to decide is whether Washington's assertion of *in personam* jurisdiction over Petitioner meets the requirements of the due process clause. In accord with this Court's decisions, beginning with *International Shoe v. Washington*, 336 U.S. 310 (1945), Respondents respectfully contend that Washington has *in personam* jurisdiction over Petitioner. Petitioner's substantial contacts with Washington, including the efforts directed toward the residents of the state, are

sufficient for the exercise of the District Court's jurisdiction. Respondent respectfully urges the Court to reject the proposal of Petitioner that a new requirement of "substantive relevance" be added to the existing requirements for the exercise of *in personam* jurisdiction.

A. The District Court Has Jurisdiction Over Petitioner Because The Petitioner's Contacts With Washington Are Sufficient For The Exercise Of Due Process of Law.

The modern benchmark for the measurement of *in personam* jurisdiction is the case of *International Shoe Co. v. Washington*, 336 U.S. 310 (1945). That Court ruled that jurisdiction is proper when a sufficient number of minimum contacts with the forum state exist and if the exercise of jurisdiction by the state conforms with "traditional notions of fair play and substantial justice." *Id.* at 316. If either of these elements is missing, the exercise of *in personam* jurisdiction would violate the due process clause of the U.S. Constitution.

The Court has also held that two primary interests must be considered in reaching a decision regarding due process. These are the protection of individual liberty from excessive state power and the state's right to protect its sovereignty in the context of federalism. The Court protects the individual's interest from litigation in an unrelated or inconvenient forum by requiring evidence that the defendant purposefully directed his conduct toward the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). The Court recognizes

that the States have legitimate interests in extending their jurisdiction to protect their citizens, but due process limits those interests. *World-Wide Volkswagen*, 444 U.S. at 292.[1] In this case, the petitioner's transaction of business in Washington makes it proper that jurisdiction be exercised by Washington courts. A corporation systematically and continuously transacting and soliciting business in a state should reasonably expect to be subject to the jurisdiction of that state. The interests of Washington in providing a forum for its own injured citizens to recover for their injuries is a legitimate state interest, and it far exceeds the rather nebulous interests of Florida, where the Petitioner currently maintains its corporate headquarters.

The due process policies and requirements established by the Court must be viewed in light of today's economic and technological realities. The Court has consistently rejected the notion of a bright-line rule in determining *in personam* jurisdiction: "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *International Shoe*, 326 U.S. at 319. "[T]he requirements for personal jurisdiction over

[1] The importance of federalism concerns must be viewed in light of the defendant's individual liberty interest. "By requiring clear evidence of some purposeful conduct on the part of the defendant, defendant's individual liberty interests are protected and at the same time the state appropriately will be recognizing the coequal sovereignty of its sister states." J. Friedenthal, M. Kane, A. Miller, *Civil Procedure* § 3.11 at 137.

nonresidents have evolved from the rigid rule of *Pennoyer* . . . to the flexible standard of *International Shoe*." *Hanson v. Denckla*, 357 U.S. 235, 251 (1957).

This flexible approach to *in personam* has expanded personal jurisdiction over nonresidents to keep pace with the national economy's transformation.

> Looking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.

McGee v. International Life Insurance Co., 355 U.S. 220, 222-23 (1957).

This Court noted ten years ago that the economic and technological advances stressed in *McGee* "have only accelerated in the generation since that case was decided." *World-Wide Volkswagen*, 444 U.S. at 293. And the acceleration of economic and technological changes mentioned in *World-Wide Volkswagen* have continued to quicken since that decision and must be considered in this decision. While due process is still required. *Hanson*, 357 U.S. at 251, the Court may take judicial notice of the great changes in telecommunication, travel and computer

technology that have occurred in the last ten years and the effect this has had on interstate business transactions. In *Burger King*, 471 U.S. 462, 476 (1984), the Court again confirmed that, once it is established that the defendant has purposefully established minimum contacts with the state, other factors, in light of modern technology, may be used to determine whether the exercise of jurisdiction meets the requirements of *International Shoe*.

Bearing in mind these economic and technological developments, the Court recently has broken *in personam* jurisdiction into two categories: general and specific jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). General jurisdiction requires continuous and systematic contacts with the forum state when the cause of action does not arise out of or relate to the defendant's contacts with the forum. This minimum contacts threshold for general jurisdiction is higher than for specific jurisdiction. While Respondents have always maintained that the activities of Petitioner have been sufficient for the exercise of general jurisdiction, the circuit court disagreed and decided this case on the basis of specific jurisdiction. Petitioner makes frequent reference to *Helicopteros Nacionales*, which dealt only with general jurisdiction.

The state has specific jurisdiction over the defendant when the "controversy is related to or 'arises out of' a defendant's contacts with the forum." *Id.* at 414. Specific jurisdiction requires fewer minimum contacts than does general jurisdiction. Specifically, the state may exercise specific jurisdiction over the defendant "if the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged

injuries that 'arise out of or relate' to those activities." *Burger King Corp.*, 471 U.S. at 472.

In this case, the term "arise out of" has been interpreted as a matter of state law by the Washington Supreme Court. Petitioner asks the Court to restrict this term by imposing another requirement, that the nature of the contacts be identical to the nature of the injury. Petitioner uses the term, "substantive relevance" to describe the additional requirement they urge the Court to adopt. This is without any real support in the Court's previous holdings and, as a matter of policy, would lead to an undue and unfair restriction on the rights of litigants to pursue claims against foreign corporations doing business in their state.

The Court's emphasis has always been on the fairness of imposing jurisdiction on a corporation that has intentionally entered the forum state for its own economic gain. Respondents recommend that the Court retain its existing approach to the "arising out of or related to" question regarding specific jurisdiction cases and base its ruling in this case on current economic realities. The ultimate question is one of fairness to be determined on a case evaluation.

> The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. . . . The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case.

Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 445 (1952).

A close reading of this Court's specific jurisdiction case does not reveal a substantive connection, to the extent suggested by Petitioner, between the cause of action and a defendant's forum contacts. To the contrary, the Court's methodology has always emphasized that the defendant must have minimum contacts with the forum. "[T]he constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum State." *Burger King*, 471 U.S. at 476 (quoting *International Shoe*, 326 U.S. at 316). Though the reasonableness of jurisdiction may lessen the minimum contacts required, minimum contacts are required before the court may consider the reasonableness of jurisdiction. *Hanson v. Denckla*, 357 U.S 235, 251, (1957); *Burger King*, 471 U.S. at 476-78. Only after ensuring that the defendant established minimum contacts by purposefully availing itself to the forum state does a court examine the nexus.

To the extent the connection between the cause of action and the defendant's contacts has been examined, courts have implicitly adopted what can be called a sliding scale approach.[2] When the defendant's contacts have not reached the general jurisdiction level, courts have not required a tight nexus between the cause of action and

[2] *See* Richman, *Review Essay*, 72 Cal. L. Rev. 1328, 1345 (1984). Mr. Richman argues that "[t]o encompass all the proper cases, they [general and specific jurisdiction] must be supplemented by a sliding scale model of defendant's forum contacts and the proximity of the connection between those contacts and the plaintiff's claims."

the contacts. Courts have required a substantial nexus between the cause of action and the contacts when the defendant has had few or only one contact with the forum state, as in *McGee*.[3] Petitioner confuses the substantial nexus between the contacts and the defendant and a proposed nexus between the type of contact and the type of claim.

Petitioner argues that the Court has always required a "substantial nexus" between the cause of action and the contacts with the forum as was found in *McGee*, 355 U.S. 220 (1957). Petitioner also argues that this holding is

[3] *McGee* is an excellent example of a case in which the Court found specific jurisdiction based on the defendant's one contact with the forum. The nonresident defendant's only contact with California was its issuance of an insurance policy and its receipt of premium payments from the insured. The California beneficiary brought suit against the defendant when it refused to pay the proceeds of the policy upon the insured's death. Concluding that the due process clause did not preclude California from having jurisdiction, the Court found that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." *McGee*, 355 U.S. 220, 223 (1957).

The Court did not find a substantial nexus between the cause of action and the defendant's contacts with California, though that existed; the defendant's only contact with California was the contract upon which the beneficiary sued. Rather, it found that the defendant's contact (the contract) with California had a substantial connection with California. As if to adduce additional support for meeting the minimum contacts threshold, the court then enumerated additional California contacts based on that contract. These contacts included the delivery of the contract in California, the mailing of premiums from California, and California as the residency of the insured and beneficiary.

"implicit" in the Court's earlier decisions. Pet. Brief at 13. For example, Petitioner correctly quotes *Keeton* as finding that the "suit arose 'out of the very activity being conducted, in part,' in that state." Pet. Brief at 12 (quoting *dicta* from *Keeton v. Hustler Magazine, Inc.*, 456 U.S. 770, 779-80 (1983)). However, the Court did not require the cause of action to arise out of the very contact with the state. Instead, the Court said that "the 'fairness' of hailing a defendant into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." *Keeton*, at 775-76. The Court required only that the claim relate to those activities in the forum; it did not require substantial connection or that the nature of the claim and the nature of the contact be identical.

Similarly, the Court in *Burger King* asserted that "[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475. The emphasis was not on the connection between the contacts and the cause of action but on the sufficiency of the minimum contacts and the reasonableness of jurisdiction. *Id.* at 476-78.

Though courts in specific jurisdiction cases examine "the relationship among the defendant, the forum, and the litigation," *Shaffer v. Heitner*, 433 U.S. 186, 204 (1976), the most important criterion has always been the defendant's minimum contacts with the forum state. The nexus between the cause of action and the defendant's contacts with the forum should be viewed as a constitutional

policy consideration once minimum contacts have been established to ensure jurisdiction conforms with "traditional notions of fair play and substantial justice." Such an approach would be the " 'highly realistic' approach," *Burger King*, 471 U.S. at 479, that the Court has continually emphasized for determining jurisdiction. If the Court adopts the additional requirement, as Petitioner suggests, the effect is to limit the application of specific jurisdiction to such a small number of cases that the concept would be meaningless. In most cases this would eliminate tort litigation altogether. Respondents respectfully urge the Court to reject this new requirement and adhere to its existing approach to *in personam* jurisdiction.

B. Carnival's Contacts With Washington State Are Sufficient To Satisfy Minimum Contacts And These Contacts Are Related To The Respondents' Cause Of Action

Since the Court adopted the general and specific jurisdiction distinction, many lower courts have confused or incorrectly applied these approaches.[4] Consequently, some courts have adopted stricter nexus requirements between the contacts and cause of action than constitutionally required. But the issue here is not whether one state may adopt a higher standard, but rather, what is the constitutionally required minimum nexus. The circuits have adopted many tests for determining the minimum

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[4] Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988).

connection between the cause of action and the defendant's forum contacts. Some tests have been very restrictive and others have broadly defined the nexus. Only two circuits, the first and eighth, have adopted a restrictive approach to defining "arising from."[5] The Seventh Circuit has adopted a broad test, allowing jurisdiction when the plaintiff's claim "lies in the wake" of the defendant's forum contacts.[6] Similarly, the Fifth Circuit, the Sixth Circuit, and the Ninth Circuit have adopted the flexible "but for" test.[7] The Washington Supreme Court, in this case, has also adopted the "but for" test.

Though Petitioner is correct in alleging that "[T]he court below acknowledged that it would have found jurisdiction lacking if it had employed the standard adopted by some [two] other circuits," Pet. Brief 15, that is not the issue. The issue is whether the Fifth, Sixth, and Ninth Circuits' "but for" standard meets constitutional scrutiny. Respondents contend the "but for" standard is constitutional in light of this Court's specific jurisdiction cases.

The court below justified its adoption of the "but for" test in terms of equity to manufacturing defendants in product liability cases and fairness to the forum states. It

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[5] *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983)

[6] *Hutter Northern Trust v. Door County Chamber of Commerce*, 403 F.2d 481 (7th Cir.1968).

[7] *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir.1981); *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir.1988); *Cubbage v. Merchant*, 744 F.2d 665 (9th Cir.1984).

found that the "application of a 'but for' standard is more consistent with cases finding jurisdiction over manufacturers of defective goods sent into a forum state." Pet. App. 15a. In other words, such a test would treat the travel industry similarly to the manufacturing industry in product liability suits and end the travel industry's preferential treatment. In this case, Petitioner is, not merely selling transportation. The advertising and promotional literature sells a product; a complete vacation, including lodging, transportation, exotic meals and entertainment. Petitioner should not be treated in a different manner than a corporation which manufactures a product, places it in the stream of commerce and causes an injury.[8] Many courts have employed the flexible "economic activity" test in product liability cases to find a basis for jurisdiction over a nonresident manufacturer which shipped its products into the forum state.[9] The application of the "but for" test similarly should be used to confer jurisdiction over nonresident travel business that purposefully avail themselves of the residents of forum in order to sell their products.

Without the adoption of the "but for" test, the travel industry and other uniquely situated industries would be free to purposefully avail themselves of many forums without being subject to those forums' jurisdictions. The

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[8] See: Knudsen, *Jurisdiction Over the Travel Industry: A Proposal to End Its Preferential Treatment*, 1983 B.Y.U.L. Rev. 101 (1983).

[9] *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969).

current state of technology almost guarantees that the amount of interstate activity in this area of commerce will increase greatly in the future. The restrictive approach that Petitioner advocates would prevent states from establishing jurisdiction over these industries, thereby giving them preferential treatment. Such a result is contrary to this Court's previous decisions because it would defeat jurisdiction when the defendant, as in this case, purposefully directed his business at the forum state. "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. There is no compelling reason for granting the travel industry special treatment in this area.

The "but for" test also gives the forum states the ability to protect its citizens from injuries caused by nonresident defendants, who would escape jurisdiction without this test. "A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* at 473 (quoting *McGee*, 355 U.S. at 223.) Further, this test is fair because it allows states jurisdiction over parties who purposefully direct their activities at forum residents and derive benefits from these activities. "[I]t may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King*, 471 U.S. at 474. This Court should preserve the right of

the states to protect its citizens by providing them a forum to recover compensation for their injuries.

C. The Ninth Circuit's "But For" Test Is A Realistic Approach To Specific Jurisdiction And Will Result In the Fair And Effective Resolution Of Jurisdiction Disputes

In adopting the "but for" test, the Ninth Circuit carefully followed this Court's precedents to ensure this test met the due process clause requirements. The court below compared this test with other tests and found that, while all tests met the due process requirements, the "but for" test is the most effective approach. Pet. App. 10a-17a.

In fact, the court below specifically found that this test protects the defendant's individual interest and would not be open-ended, as Petitioner alleges. "The 'but for test' is consistent with the basis function of the 'arising out of' requirement – it preserves the essential distinction between general and specific jurisdiction. Under this test, a defendant cannot be haled into court for activities unrelated to the cause of action in the absence of a showing of substantial and continuous contacts sufficient to establish general jurisdiction." Pet. App. 16a. To argue that this test would result in open-ended jurisdiction over nonresident defendants shows a fundamental misunderstanding of the minimum contacts requirement and the "but for" test.

Petitioner's approach to the "but for" test appears to ignore that a court first must find the defendant had minimum contacts with the forum, in effect purposeful availment, before applying the "but for" test. The Court's

current approach to jurisdiction analysis has emphasized that due process does not require a defendant to be physically present in the forum when he has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). For specific jurisdiction purposes, this minimum contacts requirement has been interpreted to require the forum state to show that the defendant " 'purposefully directed' his activities at the residents of the forum." *Burger King*, 471 U.S. at 472, (quoting *Keeton*, 465 U.S. 770-774 (1984)).

Purposeful availment is a difficult standard for the plaintiff to establish. The defendant does not purposefully avail himself to a forum state when his contacts could "be characterized as random, isolated, or fortuitous." *Keeton*, 465 U.S. 770, 774 (1983). To the contrary, the forum court must find that "the contacts proximately result from actions by the defendant himself." *Burger King*, 471 U.S. at 475. The defendant is responsible only for contacts that he directly or indirectly caused through his purposeful activities. *World-Wide Volkswagen*, 444 U.S. at 295. Also important in this consideration is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *id.* at 297. This purposeful availment requirement itself meets the petitioner's concern about an open-ended test.

To further protect the defendant from unfair litigation in unrelated forums, a recent four Justice plurality

has cited conduct to be considered as evidence of purposeful availment. According to Justice O'Connor, examples of the defendant's intent to serve the forum state include "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi Metal Industry*, 480 U.S. at 112. Petitioner's conduct in the state exceeds these requirements.

Petitioner's brief also overlooks a fundamental rule in specific jurisdiction: "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. The rule is that a defendant who has purposefully availed himself to the forum state has the burden – a compelling case – to defeat jurisdiction.

In applying these principles to the present case, the courts below correctly found that the petitioner purposefully availed itself to the forum state. Carnival Cruise Lines is not making money from Washington residents by accident. The court below, in fact, found that the petitioner "advertised in the local media, promoted its cruises through brochures sent to travel agents in that state, and paid a commission on sales of cruises in that state. In addition, Carnival [Petitioner] conducted promotional seminars in Washington designed to increase its sales to residents of that state." Pet. App. 9a. The Washington Supreme Court agreed with this analysis. Petitioner's concerns about a test without limits are clearly

groundless given this Court's minimum contacts and purposeful availment emphasis, which the court below closely followed.

All of the Court's requirements for *in personam* jurisdiction require judicial interpretation to some degree, and are susceptible to Petitioner's "open ended" argument. Petitioner must present a compelling case to defeat jurisdiction since the court below found it purposefully availed itself at forum residents and the Court should reject Petitioner's argument that the adoption of a "but for" test would result in jurisdictional anarchy. The more likely result of the adoption of petitioner's argument is that non-resident defendants would often be immune from suit, regardless of their transactions of business in the forum state.

Finally, this Court has consistently stressed that the test for jurisdiction must be based on today's economic and technological realities. The travel industry is the paradigm of an industry that has been able to escape a forum's jurisdiction after purposefully availing itself to residents of a forum state. Such a result ignores the commercial and technological realities of the travel industry and is contrary to established precedent.

> It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King Corp. v. Rudzewicz, 471 U.S. at 476 (citing *Keeton*, at 774-75; *Calder v. Jones*, 465 U.S. 783, 788-89 (1984); *McGee*, 355 U.S. at 222-23).

The "but for" approach to specific jurisdiction does not result in an open-ended and unworkable test because it closely follows this Court's guidelines in prior cases. The adoption of the "but for" standard is consistent with this Court's holdings since *International Shoe* that jurisdictional analysis must be flexible and consider the changing national economy. Simultaneously, this test still protects the individual's liberty interests; no forum may obtain jurisdiction over a nonresident defendant who has not established minimum contacts with the forum through purposefully availing itself to the forum state. The "but for" test is the logical application of this Court's approach to jurisdiction in our modern society.

II. THE LOWER COURT CORRECTLY FOUND THE FORUM SELECTION CLAUSE INVALID SINCE THE CLAUSE VIOLATED THIS COURT'S HOLDING IN *THE BREMEN*

The most prominent case involving forum selection clauses is M/S *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (*"The Bremen"*). At least in the context of commercial towing contracts, that case controls the validity of the forum selection clauses. While it is questionable whether the same policy considerations should govern a contract for cruise ship passengers, the holding and reasoning of that case applies here to resolve this matter in Respondent's favor.

Contrary to Petitioner's allegations, the Ninth Circuit's holding is consistent with this Court's admiralty decisions and *The Bremen*. The court below found that the forum selection clause was unenforceable because it was not freely bargained for and because its enforcement would deprive the respondents of their day in court. Pet. App. 23a-24a. The Court in *The Bremen* did not intend that forum selection clauses should be used unfairly by one party to a contract, based on that parties overwhelming bargaining power. It intended the opposite result. The petitioner in this case, and Amicus Curiae, seek to have the cruise ship industry given preferential treatment. This is not only inconsistent with due process of law, it is inconsistent with the Court's holding in *The Bremen*.

A. The Forum Selection Clause Is Unenforceable Because It Was Not Freely Bargained For Between The Parties To The Contract.

Petitioner spends considerable time in its brief discussing whether the forum selection clause was incorporated in the ticket and that it was reasonably communicated to the respondents. These are not relevant issues in this case. The respondents do not contest the incorporation of the provisions nor that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated. The issue is whether the forum selection clause should be enforced, not whether Respondents received the ticket. Respondents contend that it should not be enforced because it is contrary to the Court's holding in *The Bremen*, it is against public policy to

enforce such contracts of adhesion and because it violates the provisions of 46 U.S.C. § 183c.

In *The Bremen*, the petitioner Unterweser, a German corporation, entered into a contract with respondent Zapata, an American corporation. The contract provided that any disputes would be brought before the London Court of Justice and required Unterweser to tow a Zapata oil rig to the Adriatic sea from Louisiana. When the oil rig was damaged in transit, Zapata brought suit in Federal Court in Florida and the Court upheld the forum selection clause. This is quite a different factual situation than the one presented in this case.

This Court, in *The Bremen*, held that forum selection clauses are prima facia valid. *The Bremen*, 407 U.S. at 10. The Court announced five instances in which such clauses would not be enforced: when one party can show its "enforcement would be unreasonable and unjust, or, that the clause was invalid for such reasons as fraud or overreaching" *Id.* at 15; its "enforcement would contravene a strong public policy of the forum in which the suit is brought" *Id.*; or when the party will be deprived of his day in court because the "forum will be so gravely difficult and inconvenient." *Id.* at 18. The Court also addressed the issues of public policy and statutory prohibition at 15 of the opinion:

> A contractual choice of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

Following *The Bremen*, the lower court correctly found the forum selection clause unenforceable because "of the parties' disparity in bargaining power." Pet. App. 21a. The court based its decisions on many important differences between the negotiating positions of the parties in *The Bremen* and in the present case, most of which are obvious.

The parties in *The Bremen* were of similar bargaining position, unlike the parties in the present case. The parties in *The Bremen* were large, sophisticated corporations with experience in business negotiations; Zapata even made several changes in the contract after reviewing it. *Id.* at 3. Petitioner is a large corporation while Respondents are inexperienced and unsophisticated in business matters. The forum selection clause was part of Petitioner's standard contract that had not been negotiated or modified, unlike the contract in *The Bremen*, which had been negotiated and modified. As the lower court found, "the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis." Pet. App. 23a. The ticket contract also seems to prevent a refund for an unused ticket, thereby removing the passengers right to seek a refund if the clause were offensive. See: Paragraph 16(a) J.A. 15. In light of these vast differences between the parties' bargaining positions and the nature of the contract, the lower court correctly did not enforce the forum selection clause.

Other courts also have stressed the importance of the parties' relative bargaining position in deciding whether to enforce a forum selection clause. One court found no Fourth Circuit case had enforced the forum selection clause when the parties had "material differences" in

bargaining power. *Yoder v. Heinhold Commodities, Inc.*, 630 F.Supp. 756, 759 (E.D.Va. 1986). In enforcing a forum selection clause, one court found that both parties had sophisticated knowledge about the contract subject matter and had commercial experience. *Mercury Coal & Coke v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 318 (4th Cir.1982). Another court refused to enforce a forum selection clause for which the parties did not negotiate, finding that such a "take-it-or-leave-it clause will be disregarded." *Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir.1984). The parties in the present case are not of equal bargaining power. Neither was the contract freely negotiated; it was presented on a take-it-or-leave-it basis.

In a recent case in California, *Carnival Cruise Lines v. Superior Court*, 272 Cal. Rptr. 515 (1990), the California Court of Appeals refused to enforce such a clause. The Court discussed the manner in which the passengers were apprised of the forum selection clause in tickets identical to the one in this case.

> [T]he one plaintiff [out of 288] claiming awareness of the forum selection prior to departure did not have cancellation insurance. The tickets were subject to cancellation charges by Carnival. With respect to receipt of tickets, Silver [the affiant] stated: at least 44 of the plaintiffs received their tickets on actual embarking on the vessel on January 17, 1988. At least five plaintiffs received boarding passes only, no ticket at all. At least six plaintiffs received their ticket on the day of departure, four of whom received them two hours before embarkation, and at least four plaintiffs received the tickets the day before the cruise.

id. at 518.

Carnival made the same argument in that case as they do in this one. The clause gave Carnival more certainty and prevented them from being sued in the various forums in which they do business; and it was therefore reasonable. If Petitioner is relying on *The Bremen* to support its contract, its reliance is misplaced. The court did not intend that case to be a rubber stamp for all forum selection clauses, no matter how one sided the bargaining power or unreasonable the forum selected. The clause should be invalidated on these grounds alone and the circuit court's decision affirmed.

B. The Forum Selection Clause Was Unreasonable Because The Selected Forum Had Little Interest And Connection With The Controversy

Another issue is whether Petitioner's selection of Florida as a forum for all suits against it is reasonable under the circumstances. The answer is that it is an unreasonable and illogical forum under the facts of this case. None of the witnesses lived in or near Florida when this action was commenced. The majority of the lay and medical witnesses live in Washington. Petitioner mailed the Respondents' tickets to them in Washington. The ship in question left from southern California and called at ports on the west coast of Mexico before returning to California. The only connection to Florida is that Petitioner, a Panamanian corporation, now maintains its corporate headquarters there. While it might be possible to try a personal injury law suit in that state by deposition,

such a procedure would pose serious financial and tactical problems for the plaintiff in such an action. Indeed, Respondents submit that this inconvenience to potential plaintiffs is the principal reason for the clause.

Petitioner cites *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3rd Cir. 1988), as a case in which the issues are "essentially identical" to the issue in the current case. Pet. Brief 29. Petitioner is badly mistaken. The two cases could not be more dissimilar.

The *Hodes* court enforced the forum selection clause, finding the selected forum, Italy, was reasonable under the circumstances. But the circumstances showed that Italy had the most contacts with the controversy and the most interest in the outcome. The Italian-flag vessel's voyage began and ended in Italy. An Italian partnership also owned the ship at the time of the hijacking. *Id.* at 906. The ship's owners spent about ten percent of its advertising budget in the United States and Canada, but only 4.7% of the passengers were American on the voyage in question *Id.* at 907. The plaintiffs boarded in Italy and the cruise took place in the Mediterranean. In enforcing the forum selection clause, the court said that "[t]he choice of Italian venue for disputes arising out of a cruise on an Italian vessel, departing from and returning to Italy, was a sensible and fair choice." *Id.* at 913.

At the other extreme is the unreasonableness of Florida as the selected forum in the present case. As discussed above, all relevant contacts in this case are with states other than Florida. Florida's only connection with the suit is as the petitioner's principal place of business.

When compared to the reasoning and facts in *Hodes*, Florida is not the "sensible and fair choice" as a forum.

Other cases have followed the *Hodes* court's reasoning in deciding whether to enforce forum selection clauses. In enforcing the forum selection clause, one court said that Greece as the selected forum was reasonable given that the injury and cruise took place in Greece. The only persons not located in Greece were the plaintiffs and one of their physicians. *Hollander v. K-Lines Hellenic Cruises*, 670 F.Supp. 563, 566 (S.D.N.Y. 1987); *See also Walker v. Carnival Cruise Lines, Inc.*, 681 F.Supp. 470, 477-79 (N.D.Ill. 1987). (The court found reasonable the selection of Florida in the forum selection clause when the tort occurred in Florida and the voyage began and ended in Florida).

The lower court also found that enforcement of the forum selection clause would be so inconvenient to the respondents that it would deprive them of their day in court. One court was concerned that enforcement of the clause would deprive the plaintiff of his day in court when the selected forum's only contact with the suit was the defendant's principal place of business. "[W]here the clause requires the filing of a suit in a distant state it can serve as a large deterrent to the filing of suits by consumers against large corporations." *Yoder*, at 759. But courts have been less willing to consider the inconvenience of a party when the selected forum was a fair and logical choice. *Hodes*, at 916 (finding that Italy was not inconvenient considering Italy's strong connection to the action). In this case, the selection of Florida as a forum in the contract simply adds to the unreasonable nature of

the contract and reinforces the decision of the court below not to enforce such a clause.

C. The Ninth Court Correctly Applied Public Policy In Deciding Not To Enforce The Forum Selection Clause.

The petitioner is correct that two sections of the Limited Liability Act[10] apply to this case. 46 U.S.C. §183b prevents a carrier from reducing, by contract, the period to less than six months for a passenger to give notice of a claim or to reducing to less than one year the time in which to file suit. 46 U.S.C. §183c makes it unlawful for a shipping company to include in a ticket contract provisions "purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss, or injury, or the measure of damages therefore." Any contract provision that violates these statute is void.

The obvious purpose of this Act is to prevent the shipping line from taking advantage of its overwhelming bargaining power in their dealings with passengers. Petitioner alleges that these statutes allow forum selection clauses because they did not specifically prohibit them. Such a construction of a remedial statue is incorrect. The rule of statutory construction of remedial statutes is that they should be interpreted broadly to effectuate their purpose. *Peyton v. Rowe*, 391 U.S. 54 (1967); *Tchereprin v. Knight*, 389 U.S. 332 (1967); *Just v. Chambers*, 312 U.S. 383, 385 (1940). One statutory purpose of the Limited Liability

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[10] 46 U.S.C. § 181 et seq.

Act was "to afford an opportunity for the determination of claims against the vessel and its owner." *Just*, 312 U.S. at 385. While the application of the forum selection clause may not directly prevent this determination of claims, it does cause plaintiffs unreasonable hardship in protecting themselves. Moreover, one hardly can imagine how the enforcement of a forum selection clause would protect the plaintiff. Its effect, and probably its intent, is "to lessen, weaken, or avoid the right of any claimant to a trial," a result that this Act specifically prohibits. It plaintiffs, such as Respondents, are required to travel to distant, unrelated forums to pursue their claims, many will be unable to bring their actions and will therefore not be compensated for their injuries. This is precisely the result Congress intended to avoid.

There are numerous reasons why the forum selection clause should be held to be unenforceable, but its statute alone is sufficient. The Court should affirm the decision of the court below and allow this case to be pursued in the United States District Court for the Western District of Washington.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and this case should be remanded to the United States District Court for the Western District of Washington.

Respectfully Submitted

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No. 89-1647

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Supreme Court of the United States
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CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. THE DISTRICT COURT LACKED *IN PERSONAM* JURISDICTION

Respondents apparently agree that Carnival's contacts with the forum state—promoting its cruises and paying a commission to travel agents—are not substantively related to the cause of action here for negligence allegedly occurring aboard the ship. Respondents argue, rather, that the only constitutional prerequisite to the exercise of specific jurisdiction is the defendant's "purposeful avail-

ment" of the right to do business in the forum state. Resp. Br. at 19-20, 21-22. If this one requirement is met, Respondents contend, the burden should shift to the defendant to make "a compelling case" that jurisdiction is unreasonable in light of all the circumstances of the case. *Id.* at 23.

Respondent's position is flatly inconsistent with the requirements for specific jurisdiction as indicated by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and subsequent cases. *See* Pet. Br. at 11-13. The existence of an adequate connection between the cause of action and the defendant's contacts has not been treated "as a constitutional policy consideration," Resp. Br. at 16-17, nor can it be considered a "new" requirement, Resp. Br. at 9. Rather, this Court has long treated it as integral to specific jurisdiction; the exercise of specific jurisdiction requires both that "the defendant has 'purposefully directed' his activities at residents of the forum" *and* that "the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) and *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 (1984)).[1]

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[1] Thus, Respondents' reliance on *Burger King* and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) is misplaced. *Burger King* was a contract action, where the contract had been entered into and partly performed in the forum state. 471 U.S. at 480. "[W]here individuals 'purposefully derive benefit' from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise *proximately* from such activities . . . ." *Id.* at 473-74 (citation omitted) (emphasis added). *McGee* was also a contract action, under which defendant owed plaintiff a duty to provide a service—life insurance protection of an individual resident—in the forum state. In *Burger King* and *McGee*, the dispute "grew directly out of 'a contract which had a *substantial* connection with that State.'" *Burger King*, 471 U.S. at 479 (quoting *McGee*, 355 U.S. at 223) (emphasis in original).

Respondents would have this Court either jettison or severely eviscerate the second of the two requirements.[2] The existence of both requirements is fully justified, however, because they generally serve different purposes. The requirement of purposeful direction primarily serves to permit jurisdiction only where it is reasonably foreseeable, and thus reduces the element of unfair surprise to a nonresident in being subjected to long-arm jurisdiction. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The requirement of relatedness, on the other hand, primarily serves to permit jurisdiction only where the forum state has a sufficient interest in deciding the case. As we noted in our opening brief, this Court explained in *International Shoe* that long-arm jurisdiction is consistent with due process because, and "so far as," it enforces "obligations [that] arise out of or are connected with the activities within the state." 326 U.S. at 319. *See* Pet. Br. at 12.

Respondents' position also disregards the distinction between specific and general jurisdiction. General jurisdiction exists when the defendant's activities in the forum state are sufficiently continuous and systematic to make the assertion of *in personam* jurisdiction reasonable; the forum state can then exercise general jurisdiction over the defendant notwithstanding the lack of a connection between the activities and the cause of action. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952). General jurisdiction may be viewed in this regard as

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[2] As noted in our petition for certiorari, this Court's recent decisions have indeed focused on the requirement of purposeful availment. Pet. at 7-8. This is not because it is more important than the second requirement of a substantive relationship, but because the second issue was not presented for decision in those cases. *See, e.g., Helicopteros*, 466 U.S. at 415 & n.10.

analogous to jurisdiction based upon personal presence. *See* Pet. Br. at 11 n.10. By weakening the requirement for specific jurisdiction that the cause of action arise out of or relate to the defendant's contacts, Respondents' position would effectively eliminate specific jurisdiction as a distinct form of jurisdiction and expose nonresident corporations to a panoply of litigation in jurisdictions where their contacts are in no way tantamount to physical presence.[3]

Respondents suggest that, "[t]o the extent the connection between the cause of action and the defendant's contacts has been examined, courts have implictly adopted what can be called a sliding scale approach." Resp. Br. at 14 (*citing* Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction (Part II)*, 72 Calif. L. Rev. 1328 (1984)). Yet Respondents cite no judicial authority for such an approach, let alone authority from this Court. In any event, a "sliding scale" for specific jurisdiction would be utterly unworkable and, if adopted by this Court, would leave lower courts with no guidance in deciding whether jurisdiction is proper. Respondents do not suggest how courts should go about weighing "defendant's forum contacts" against "the connection between those contacts and the plaintiff's claims." Richman, *supra*, at 1345. For that matter, Respondents do not even give any reason why jurisdiction over Carnival would be proper under the test they propose. Here, both sides of the "sliding scale" weigh against

[3] The swallowing of specific jurisdiction by general jurisdiction would be particularly ironic in light of the fact that the "minimum contacts" test was announced by this Court in *International Shoe*, a specific jurisdiction case. When the Court later indicated in *Perkins* that general jurisdiction was constitutional under some circumstances, it repeatedly noted the "arising out of" proviso of *International Shoe* and observed that "[t]he instant case takes us *one step further* to a proceeding in personam to enforce a cause of action not arising out of the corporation's activities in the state of the forum." 342 U.S. at 444-46 (emphasis added).

jurisdiction: defendant's contacts with the forum state are limited to the promotion of services that take place entirely outside the forum, and those contacts are related tenuously, at best, to the cause of action.

For the reasons set forth in Petitioner's opening brief, the "but for" test employed by the Court of Appeals is no more satisfactory than the "sliding scale" test presented by Respondents. *See* Pet Br. at 15-20. The extent to which the "but for" test would expand specific jurisdiction—contrary to the precedents of this Court requiring a nexus between the contacts and the cause of action—is further illustrated by *Kulko v. Superior Court*, 436 U.S. 84, 93 (1978). In that action, the plaintiff had sued her former husband, a New York resident, in California. Plaintiff sought to establish a Haitian divorce decree as a California judgment, to obtain full custody of their children, and to obtain an increase in child support. *Id.* at 88. Because plaintiff and defendant had married in California, defendant's contacts with that state were arguably a "but for" cause of the action. Nonetheless, this Court held that where plaintiff and defendant married in California "and thereafter spend their entire married life in New York, the fact of their California marriage by itself cannot support a California court's exercise of jurisdiction" over a spouse who was a New York resident at the time of the suit. *Id.* at 93.

The inadequacy of the "but for" test is particularly clear in a case such as this one, where the injuries alleged did not even occur in the forum state. This Court has observed that the foreseeability of causing injury in the forum state "is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (*quoting World-Wide Volkswagen*, 444 U.S. at 295). Even if the foreseeability of causing injury in the forum state were sufficient, that would not aid Respondents; here, no defective product was sent into the forum state, and no injury occurred there.

Respondents' analysis also errs in two other respects: first, as to the balancing of the interests of different states, and second, as to the role of "economic and technological advances." Respondents argue that "[t]he interests of Washington in providing a forum for its own injured citizens to recover for their injuries is a legitimate state interest, and it far exceeds the rather nebulous interests of Florida . . . ." Resp. Br. at 10. Yet it is not clear why Washington's interest in providing a forum for its plaintiffs must outweigh Florida's interest in providing a forum for its defendants, and if Washington for some reason did have a comparatively stronger interest, that could not independently justify the exercise of *in personam* jurisdiction. As noted by the Court in *Kulko*, California's "substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children . . . simply do not make California a 'fair forum' . . . ." 436 U.S. at 100 (citation omitted).

Moreover, requiring that independent weight be given to interests of the forum state in determining the existence of jurisdiction would thrust upon lower courts the unguided and unreviewable task of ascertaining how much weight a forum state's interest is due and whether that interest outweighs other factors pointing against jurisdiction, including interests of other states. Like the "sliding-scale" test, this weighing would essentially take the doctrine out of personal jurisdiction doctrine and make litigation over these issues wholly unpredictable.

Respondents cite the Court's statement in *World-Wide Volkswagen* that "the historical developments [in transportation and communication] noted in *McGee* have only accelerated in the generation since that case was decided." Resp. Br. at 11. Respondents contend that "the acceleration of economic and technological changes mentioned in *World-Wide Volkswagen* have continued to quicken since that decision and must be considered in this decision." *Id.* Apparently, Respondents would have this Court make the

standards for personal jurisdiction continually ratchet downward with the passage of time. That view erroneously assumes the due process limitations on personal jurisdiction to be based solely on convenience. What personal jurisdiction requires is not convenience, however, but legitimacy. In *World-Wide Volkswagen*, beginning with the very next sentence after the one quoted by Respondents, this Court made that distinction clear:

> Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of States was foreseen and desired by the Framers. . . . But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

444 U.S. at 293.[4]

It should also be noted that Respondents' contention as to the effect of economic and technological progress stands in stark contrast to the argument they make elsewhere regarding the burdensome nature of the forum selection clause. To the extent that developments in transportation and communication have made out-of-state litigation more feasible for defendants in the period since this Court decided *World-Wide Volkswagen*, they have

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[4] *See also Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.").

also made out-of-state litigation more feasible for plaintiffs in the period since this Court decided *The Bremen*.[5] As the following section will discuss, Respondents' arguments against enforcement of the forum selection clause have no more merit than their jurisdictional arguments.

II. THE FORUM SELECTION CLAUSE IS VALID

In *The Bremen*, this Court held that "the forum clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. The Court stated that the party seeking to avoid the clause must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.*

Respondents argue that *The Bremen* should, in effect, be limited to its facts. It is true that the Court in *The Bremen* referred to the fact that the clause before it was in a negotiated international commercial transaction, *id.* at 17, but nothing in the opinion indicates that its holding was limited to that context. On the contrary, the Court stated that even where the parties chose such a remote forum as to suggest that "the agreement was an adhesive one," the rule is still that "the party claiming should bear a heavy burden of proof." *Id.* at 17.

While conceding that the clause here was reasonably communicated, Resp. Br. at 26, Respondents argue that it should not be enforced for various reasons. Respondents iterate the position of the court of appeals that the ticket is unenforceable because Carnival had greater bargaining power, a position that seemingly renders all forum selection clauses (and possibly other clauses) in a form ticket contract *per se* unenforceable. As discussed in Petitioner's opening brief, however, a party cannot be

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[5] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*").

considered to have "overweening"[6] bargaining power within the meaning of *The Bremen* simply because a form consumer contract is involved. *See* Pet. Br. at 27-29.[7]

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[6] 407 U.S. at 12. Respondents erroneously state, in this regard, that the ticket contract prevents refunds in the event a passenger objects to the forum selection clause. Resp. Br. at 28. Paragraph 16(a) of the ticket contract forbids refunds for unused tickets after a cruise, but the brochure provided to prospective passengers makes clear that refunds are available to passengers who cancel a reasonable period before the cruise. The brochure is Exhibit D to the Hinrichs Affidavit, CR-16. The Shutes received the brochure. *See* Shute Declaration, ¶ 5, J.A. 11; Hinrichs Affidavit, ¶ 7, J.A. 14.

The final page of the brochure, captioned "General Information," states that a seven-day cruise (such as the one taken by Respondents) can be cancelled between 16 and 45 days before sailing with a $100 penalty, and between 3 and 15 days before sailing with a $200 penalty. The brochure advises "the purchase of trip cancellation insurance from your travel agent."

Sample copies of the terms and conditions are available to any passenger or travel agent upon request. *See Carnival Cruise Lines, Inc. v. Superior Court*, 222 Cal. App. 3d 1548, 272 Cal. Rptr. 515, 519 (1990).

[7] The Seventh Circuit, in *Northwestern National Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990) (Posner, J.), recently upheld the enforceability of a forum selection clause in a non-maritime form contract. There, the defendants sought to have the clause held invalid. The court of appeals noted the importance and pervasiveness of form contracts: "Ours is not a bazaar economy in which the terms of every transaction, or even of most transactions, are individually dickered; even where they are, standard clauses are commonly incorporated in the final contract, without separate negotiation of each of them." *Id.* at 377. The court squarely rejected the proposition that the status of a contract as a form contract renders a forum selection clause unenforceable. *Id.*

Further, the court pointed out that any inconvenience imposed upon defendants was not "gratuitous"—"(if the cases ever go to trial, which most do not)"—in that the inconvenience to defendants of trying the case in the contractual forum was mirrored by the inconvenience to plaintiffs of trying the case in a noncontractual forum. *Id.* at 378. In a competitive market, these cost savings

Respondents also characterize Florida as an "unreasonable and illogical forum," Resp. Br. 30, disregarding the fact that Carnival's head office, its legal department, its passenger claims processing department, and its records concerning its employees and the maintenance of its vessels are all located in Florida.[8] At any rate, Respondents limit the inquiry tendentiously by considering the convenience or inconvenience generated by the clause only as it operates in this particular case and by demanding that the clause be held reasonable only if it is tailored precisely to the facts presented here. A forum selection clause in a form contract necessarily must cover a variety of factual situations, and so the clause should be evaluated *ex ante* on the basis of whether it is reasonable in light of the range of those situations. Here, most Carnival ships have normally operated out of ports in Florida or the Caribbean, and the contractual forum reflects that fact.[9]

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from an enforceable forum selection clause would be enjoyed by plaintiff's customers, including defendants, so "the defendants were compensated in advance for bearing the burden of which they now complain, and will reap a windfall if they are permitted to repudiate the forum selection clause." *Id.*

The court suggested that the result in *Shute* may have been justifiable under its facts, *id.* at 376, but that suggestion was made without any analysis of, and possibly without any awareness of, the cases of this Court and the courts of appeals that have upheld printed conditions (including forum selection clauses) in maritime and non-maritime passenger tickets. *See* Pet. Br. at 21-24.

[8] *See Carnival Cruise Lines, Inc. v. Superior Court*, 272 Cal. Rptr. at 519.

[9] *Id.* Respondents apparently concede that Florida would be a reasonable forum for accidents occurring on cruises that originated from that state. *See* Resp. Br. at 31-31. However, it is difficult to predict at the time of a cruise where the particular vessel may be sailing months or years later when an injury claim is litigated. Thus, it was reasonable for Carnival to designate Florida as the forum for all claims, including those arising on cruises originating from other locations.

Further, *The Bremen* specifically indicated that a mere finding that "the balance of convenience" favors a non-contractual forum "falls far short of a conclusion that [a party] would be effectively deprived of its day in court. . . ." 407 U.S. at 18; *The Bremen* also approved the use of depositions as an adequate means of obtaining testimony from witnesses who cannot be sent to the contractual forum, *id.* at 19. The rule in *The Bremen* that a forum selection clause cannot be overturned on the basis of the "balance of convenience" has a sound basis not only in the normal respect for contracts, but also in the need for predictability in determining where cases can be litigated. *See id.* at 13.[10] To make the enforceability of a forum selection clause depend on a multi-factor *forum non conveniens*-type balancing test, as Respondents would do, is to deny the efficiency and predictability that such clauses are designed to achieve.

Finally, Respondents argue that the clause is unenforceable under 46 U.S.C. § 183c as a provision "purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damage therefor." The clause does not, however, purport to take away Respondents' right to a trial by a court. *See* Pet. Br. at 33-35. Respondents do not refer to any record evidence for their assertion that the clause was intended to deprive passengers of the ability to pursue meritorious claims, Resp. Br. at 31, 34, nor could they do so. The forum selection clause in this case,

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[10] The difficulties inherent in the "balance of convenience" inquiry that Respondents would have the courts make is illustrated by Respondents' characterization of *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 109 S. Ct. 1633 (1989). Many would consider a forum selection clause requiring U.S. ticket purchasers to sue in Italy—as did the clause in *Hodes*—to be considerably more burdensome, and less reasonable, than a clause requiring suit in Florida. Yet Respondents come to the opposite conclusion. *See* Resp. Br. at 31.

like the limitation procedure established by 46 U.S.C. § 185, *see* Pet. Br. at 30 n.28, serves the legitimate purpose of setting forth a single forum where potentially numerous claims can be litigated.[11]

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded to be dismissed for lack of jurisdiction over the person or, in the alternative, dismissed or transferred pursuant to 28 U.S.C. § 1406(a).

Respectfully submitted,

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[11] Respondents quote a statement in *Just v. Chambers*, 312 U.S. 383 (1941) that the Limited Liability Act was intended " 'to afford an opportunity for the determination of claims against the vessel and its owner.' " Resp. Br. at 34 (*quoting Just*, 312 U.S. at 385). Actually, the provision at issue there was the procedure set forth by the Act permitting vessel owners to limit their liability. The full text of the quoted sentence in *Just* is as follows: "The statutory provision for limitation of liability, enacted in the light of the maritime law of modern Europe and of legislation in England, has been broadly and liberally construed in order to achieve its purpose *to encourage investments in shipbuilding* and to afford an opportunity for the determination of claims against the vessel and its owner." (Emphasis added.)

(6)

No. 89-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,
v.
EULALA SHUTE and RUSSEL SHUTE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Chamber of Commerce of the United States (the "Chamber") respectfully submits this brief *amicus curiae* in support of petitioner, Carnival Cruise Lines, Inc. ("Carnival").[1] The Chamber is the nation's largest federation of businesses, representing more than 180,000 companies as well as several thousand trade and profes-

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[1] Both petitioner and respondent have consented to the Chamber's filing of this brief, and the parties' consent letters are being filed simultaneously with the brief.

sional associations and state and local chambers of commerce. Ninety percent of the Chamber's members are businesses with fewer than 100 employees, and seventy percent have fewer than twenty employees. The Chamber also sponsors The Council of Small Business which seeks to promote the needs of small businesses.

The Chamber has surveyed many of its members in the manufacturing, wholesale, retail, and service industries and determined that, particularly as applied to small businesses, the decision of the United States Court of Appeals for the Ninth Circuit fails to accommodate the realities of the contemporary marketplace and will place prohibitive costs upon small businesses and the persons they employ. For these reasons, and as further set forth in this brief, the Chamber believes that the Ninth Circuit's ruling "offend[s] 'traditional notions of fairness and substantial justice,'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted), implicated by due process. As the principal voice of the American business community, the Chamber, together with its membership, has a strong interest in the outcome of this case.

STATEMENT OF THE CASE

This case arises from a Washington district court's exercise of *in personam* jurisdiction over petitioner, Carnival Cruise Lines, Inc., a Panamanian cruise line with its principal place of business in Miami, Fiorida. The case involves the Washington purchase of cruise tickets by respondents, Eulala and Russel Shute, from Carnival and the subsequent injuries the Shutes allegedly sustained in international waters during that cruise.

Carnival's ships do not make ports of call in Washington. Carnival's only contacts with Washington consist of placing advertisements for its cruises in newspapers, presenting seminars for travel agencies (including distributing brochures), and paying travel agencies a ten percent commission for tickets they sell. Carnival is not registered to do business in Washington, has never paid business taxes in the state, and does not maintain an office or bank account there.

After purchasing tickets from a Washington travel agency, the Shutes embarked from Los Angeles, California, upon Carnival's ship the M/V TROPICALE. While in international waters off the coast of Mexico, Eulala Shute was injured when she allegedly slipped on a deck mat.

The Shutes subsequently filed suit against the Miami-based Carnival in the United States District Court for the Western District of Washington, where the court dismissed the action for lack of *in personam* jurisdiction. *Shute v. Carnival Cruise Lines*, No. C86-1204D (W.D. Wash. June 25, 1987). On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding, *inter alia*, that an exercise of jurisdiction was consistent with the due process clause of the fourteenth amendment. *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1988).

SUMMARY OF ARGUMENT

This Court should reverse and remand the decision of the United States Court of Appeals for the Ninth Circuit as violative of the due process clause of the fourteenth amendment. Building upon a constitutional precipice that would permit exercise of universal jurisdiction over any business advertising in a national media, the "but for" test adopted by the Ninth Circuit for applying the second prong of the specific jurisdiction standard vitiates the distinction between general and specific *in personam* jurisdiction because it (1) ignores the fundamental exchange of benefits and obligations between a defendant and the forum that forms the basis of specific jurisdiction, and (2) in effect permits exercise of general jurisdiction over a defendant in the absence of

a defendant's continuous and systematic presence in the forum.

The Ninth Circuit's decision further violates due process standards in that, particularly as applied to small businesses, the decision permits an exercise of jurisdiction far beyond the jurisdictional risk a defendant assumes based on its contacts with the forum. This violation of standards of fair play and substantial justice is compounded by the Ninth Circuit's contravention of important due process limitations on state power effected through protection of individual liberty interests. The Ninth Circuit's disregard of these limitations on state power permits jurisdictional overreaching by a forum state, does not protect the power of non-forum states, and thereby fails to ensure the just and orderly administration of the laws. Finally, if not reversed, the Ninth Circuit's decision, through disregarding the locus of the exchange of goods and services, will have substantial detrimental impact on small businesses, in contravention of long-standing national policy as well as this Court's mandate that exercise of jurisdiction adapt to the contemporary market place.

In fashioning a test for application of the second prong of the specific jurisdiction standard that satisfies the constitutional minimums of due process, this Court should look to the fundamental exchange of benefits and obligations between a defendant and the forum that provides the basis for specific jurisdiction. This necessarily includes consideration of the jurisdictional risk the defendant assumed, due process limitations on state power that ensure orderly administration of the law, and the need to adapt the law to the contemporary marketplace The test should be whether the defendant, through his purposefully directed activities to residents of the forum, may be deemed to have assumed the risk of the litigation in the forum. This test should look not merely to whether the defendant subjectively consented to jurisdiction, but to whether, through the defendant's activities, a similarly situated defendant reasonably would have anticipated the risk of the litigation in the forum. In applying this standard, the parties should be afforded an opportunity to present to the trial court those facts that bear upon Carnival's assumption of the risk of the litigation in Washington. For these reasons, the Court should reverse the Ninth Circuit's decision and remand the case for further proceedings.

ARGUMENT

I. THE COURT SHOULD REVERSE THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Ninth Circuit's Decision Impermissibly Shifts the Jurisdictional Center of Gravity Away from the Locus of the Exchange of Goods and Services

A court acting pursuant to a state long-arm statute may exercise either general or specific *in personam* jurisdiction over an absent defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn. 8-9 (1984). A court may exercise general jurisdiction over a defendant for any cause of action if the defendant has a "continuous and systematic" presence in the forum. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952). Where, as here, a defendant does not have a "continuous and systematic" presence in the forum, a court may exercise specific jurisdiction over the defendant where "the defendant [1] has 'purposefully directed' his activities at residents of the forum . . . and [2] the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Keeton*

v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984), and *Helicopteros Nacionales de Colombia*, 466 U.S. at 414).

The two prongs of the specific jurisdiction standard are not independent: to determine whether the litigation arises out of or relates to a defendant's forum activities under the second prong of the standard, it is necessary first properly to characterize under the first prong of the standard what those activities are. It is here that the Ninth Circuit first falters. Through mischaracterizing under the first prong of the specific jurisdiction standard the essential nature of Carnival's activities in Washington, the Ninth Circuit fashions a test for the second prong of the standard that ultimately contravenes the fourteenth amendment.

Carnival's activities in Washington reflect the fundamental fact that it does not exchange goods or services there. Carnival's activities as they affected the Shutes were limited to advertising, presenting seminars for travel agencies, and mailing tickets to passengers who purchased them through third-party travel agencies. Such activities were at best incidental to providing goods and services elsewhere. Placing advertisements, in today's modern commercial environment, can hardly be viewed as substantial activity in Washington, inasmuch as the Shutes could have as easily seen the same advertisement in an out-of-state newspaper sold in the Seattle airport or available in their local library. Similarly, Carnival's seminars could have as effectively been held in another state, and Carnival's mailing tickets to the Shutes postmarked from Florida merely reinforced the fact that Carnival was *not* doing business in Washington.

Conversely, the Shutes had no reasonable expectation that goods or services were being exchanged in Washington. The Shutes traveled to Los Angeles to embark; their cruise took place largely in international waters, where Mrs. Shute's injuries allegedly occurred. In fact, the Shutes' only Washington activity related to their

Carnival cruise occurred when they purchased tickets from a third-party travel agency.[2]

Such incidental contacts with a forum are not unique to Carnival but are representative of wide-spread practices among the Chamber's members. The conduct of business, through the integration of technology, routinely traverses jurisdictional boundaries where no party to the transaction is doing business. Telefaxes and telecommunications are ubiquitous. Satellites now convey television and its advertising far beyond the local jurisdiction where it originally was broadcast.

Consistent with this Court's decisions, such incidental forum contacts like Carnival's here cannot be permitted to shift the jurisdictional center of gravity away from the locus of the exchange of goods and services. As this Court has recognized, merely entering a contract, *Burger King*, 471 U.S. at 479; *Rosenberg Bros. v. Curtis Brown Co.*, 260 U.S. 516 (1923), or soliciting, *International Shoe*, 326 U.S. at 314; *Green v. Chicago, Burlington & Quincy Ry.*, 205 U.S. 530 (1907), in the forum without more will not support an exercise of jurisdiction. Thus, building upon a constitutional precipice that would permit exercise of universal jurisdiction over any business advertising in a national media, the Ninth Circuit's test for the second prong of the specific jurisdiction standard emerges to contravene the fourteenth amendment.

B. The Ninth Circuit's Decision Vitiates the Distinction Between General and Specific *In Personam* Jurisdiction

The Ninth Circuit held below that, for the purpose of satisfying the second prong of the specific jurisdiction

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[2] Indeed, the Chamber is aware of no record evidence that establishes that the Shutes, in fact, relied upon any of Carnival's contacts with Washington in purchasing their cruise tickets.

standard, a cause of action arises out of [3] activities in the forum where those activities are a "but for" cause of the injuries that are the subject of the litigation. *Shute*, 897 F.2d at 383-86. Contrary to the due process clause of the fourteenth amendment, however, the Ninth Circuit's "but for" test nullifies the distinction between general and specific jurisdiction.[4]

The nomenclature of "specific" and "general" jurisdiction was first adopted by the Court in *Helicopteros Nacionales de Colombia*, although the distinction between jurisdiction based on a defendant's continuous and systematic presence in the forum, and jurisdiction based on lesser forum contacts that give rise to the litigation, was recognized in *International Shoe*, 326 U.S. at 318. Indeed, the distinction predates that decision. *Id.* (and citations therein). Thus, while the Court on occasion has noted the absence of a sufficient relationship between a defendant's forum contacts and the litigation to support jurisdiction, *see, e.g., Shaffer v. Heitner*, 433 U.S. 186, 213 (1977) (shareholder's derivative suit against out-of-state directors not "related to" directors' stock sequestered in the forum); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (action regarding out-of-state trustee's administration of a trust did not "arise out of" unilateral actions of the in-state settlor), the Court has not, either before or after *Helicopteros Nacionales de Colombia*, expressly enunciated why, in exercising specific jurisdiction, a relationship between a defendant's forum contacts and the litigation is necessary to satisfy the mandates of due process.

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[3] Because the Washington long-arm statute extends to the full extent permitted by due process, *Shute v. Carnival Cruise Lines*, 113 Wash. 2d 763, 783 P.2d 78 (1989), the Ninth Circuit apparently construed the words "arising out of" in the statute to be synonymous with the "arising out of or relating to" standard enunciated by this Court, *Shute*, 897 F.2d at 383-86, although the words "relating to" do not, in fact, appear in the statute. Wash. Rev. Code Ann. § 4.28.185 (1988).

[4] *Cf. Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986).

The Court, however, implicitly recognized the genesis of the second prong of the specific jurisdiction standard when it heralded the modern law of jurisdiction in *International Shoe*. There, the Court stated:

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe, 310 U.S. at 319. Thus, where due process requires a connection between a defendant's forum contacts and the litigation, the requirement arises because the benefits and protections the defendant enjoyed were confined to its limited activities with respect to the forum, and, accordingly, the concomitant obligations the defendant assumed similarly were limited to those same activities. Therefore, the required connection between the defendant's forum contacts and the litigation has its foundation in an exchange of benefits and obligations between the defendant and the forum, *see generally Hanson*, 357 U.S. at 252 ("this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised [in the forum]"), a relationship the Court recently analogized, in construing related principles of jurisdiction, as contractual. *Burnham v. Superior Court of California*, 110 S. Ct. 2105, 2117 (1990) ("[w]e daresay a contractual exchange swapping those benefits for that power would not survive the 'unconscionability' provision of the Uniform Commercial Code"); *see also id.* at 2125 n.14 (Brennan, J., concurring) (the opinion of the Court "maintains that, viewing transient jurisdiction as a contractual bargain, the rule is 'unconscionabl[e]'")

(alteration in original).[5] It is through disregarding this fundamental exchange of benefits and obligations between the defendant and the forum that the Ninth Circuit's "but for" test undermines the distinction between general and specific jurisdiction.

The "but for" test permits a plaintiff to maintain a cause of action where the plaintiff's injury bears no relationship, based upon reason or common experience, to a defendant's limited activities in the forum. Indeed, as one commentator noted, " 'the [but for] causes of an event go back to the discovery of America and beyond.' " Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 92 (quoting W. Prosser & P. Keeton, *The Law of Torts* 567 (4th ed. 1971)). In the absence of any real nexus between a defendant's forum contacts and the plaintiff's injury, the "but for" test disregards the limitations inherent in the exchange of benefits and obligations between the defendant and the forum—in effect, rendering a defendant subject to an exercise of general jurisdiction for essentially any cause of action based only on the showing of "purposefully directed" activities toward the forum required by the first prong of the specific jurisdiction standard. By obviating the general jurisdiction requirement for a "continuous and systematic presence" in the forum, the Ninth Circuit's "but for" test vitiates the constitutionally mandated distinction between specific and general jurisdiction.

Just as "technological progress" and the increased "flow of commerce" mandated the casting-off of outmoded theories of jurisdiction in *International Shoe* (*see Hanson*, 357 U.S. at 250-51), so too the distinction between specific and general jurisdiction must, contrary to the "but for" test, remain consonant with the contemporary market-

[5] This exchange of benefits and obligations underlying the second prong of the specific jurisdiction standard, of course, goes hand-in-hand with the considerations of predictability discussed in part I-C, *infra*.

place. Through failing to account for fundamental changes in the marketplace wrought by technology's ready access even to small businesses, the "but for" test disregards this Court's admonition that due process "can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Shaffer*, 433 U.S. at 212.

As we enter the twenty-first century, once cutting-edge business practices are giving way to the full maturing of the "technological age." Advertising can no longer be circumscribed within a local jurisdiction: cable broadcasters now retransmit local television to foreign jurisdictions without the consent of the local station or the advertiser, and once local newspapers now commonly are available in many other communities' public libraries. Capital markets permit an investor, with the push of a button on a personal computer, to direct a broker in another state to purchase securities, while that broker, within minutes and again through the push of a button, effects the purchase in a third state, where the bargain is most favorable. Commodities, for example crude oil, are traded several times in the same day between purchasers and sellers in as many states, while the oil itself maintains an unchanging course in an ocean tanker.

Through this integration of technology, the conduct of business routinely traverses jurisdictional boundaries in the absence of the parties exchanging goods or services there. As previously established, technological progress cannot be permitted to shift the jurisdictional center of gravity away from the locus of the exchange of goods and services. *International Shoe*, 326 U.S. at 314, 318; *Rosenberg Bros.*, 260 U.S. 516; *Green*, 205 U.S. 530. Conversely, a "but for" test that permits such incidental contacts to support an exercise of specific jurisdiction impermissibly allows the advance of technology to render the distinction between specific and general jurisdiction

meaningless and, thereby, to retard continued progress in the marketplace.

C. The Ninth Circuit's Decision Violates Due Process Standards of Fair Play and Substantial Justice

The "constitutional touchstone," *Burger King*, 471 U.S. at 474, of the due process limitation on *in personam* jurisdiction is whether an exercise of jurisdiction "offend[s] 'traditional notions of fair play and substantial justice.'" *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987) (quoting *International Shoe*, 326 U.S. at 316). This Court has held that accepted notions of fairness and justice require that application of state long-arm statutes provide "'a degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where . . . conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

As Justice Stevens noted in his concurrence in *Shaffer v. Heitner*, such predictability, or notice:

> [I]ncludes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. If I visit another State, or acquire real estate or open a bank account in it, I *knowingly assume some risk* that the State will exercise its power over my property or my person while there. My contract with the State, though minimal, gives rise to *predictable risks*.

433 U.S. at 218 (emphasis added). *See also Burnham*, 110 S. Ct. at 2124 (Brennan, J., concurring). Such predictable risks afford a defendant "clear notice that it is subject to suit [in the forum], and [thereby, it] can act to alleviate the *risk* of burdensome litigation by procuring insurance, passing the expected costs on to customers, or,

if the *risks* are too great, severing its connection with the State." *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added).

The Ninth Circuit's "but for" test does not comport with this due process mandate of predictability required by accepted notions of fairness and justice, inasmuch as it permits a plaintiff to maintain a cause of action so attenuated from the defendant's actions in the forum as to exceed any reasonable "jurisdictional risk"[6] the defendant assumed based upon its limited contacts with the forum. The "but for" test thus allows an exercise of jurisdiction in circumstances that go far beyond the expectations that the ordinary commercial experience of potential defendants supports.

This disregard of the jurisdictional risk a defendant assumes, the Chamber's inquiry among its members revealed, bears particularly hard on small businesses—which do not operate in national markets and are left without any accessible standard upon which to "structure their primary conduct," *Burger King*, 471 U.S. at 472, and upon which to predict where they may be subject to suit. A few simple examples, typical of the Chamber's many small business members, aptly illustrate their plight under the Ninth Circuit's "but for" test.[7]

The Ninth Circuit's "but for" test would permit an Oregon district court to exercise jurisdiction over a small Washington manufacturer whose only contact with Oregon was that it shipped its products through the state by truck for sale in California, where they injured a visiting Oregon plaintiff. Under the Ninth Circuit's test, the suit would satisfy the second prong of the specific

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[6] *See* Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 649 (1988).

[7] In contrast, most large national businesses are subject to suit in essentially all states.

jurisdiction standard, inasmuch as, in the absence of the manufacturer's transporting its products through Oregon, the injuries would not have occurred.[8]

Similarly, a small Alaskan charter airline could be subject to suit in California where a California plaintiff was injured on one of the airline's flights, despite that the airline's only contact with California was its advertisement in a national fishing magazine. Under the Ninth Circuit's "but for" test, the suit again would satisfy the second prong of the specific jurisdiction standard, inasmuch as the airline's solicitation in California was a but for cause of the claimed injuries.

Finally, a small Ohio wholesaler of specialty machine parts could be subject to a tortious breach of contract suit in California despite that its only contact with California was that, pursuant to a contract with an Ohio manufacturer, it delivered machine parts to the manufacturer's subcontractor in California. Under the Ninth Circuit's "but for" test, this suit as well would satisfy the second prong of the specific jurisdiction standard, because, but for the delivery of the machine parts, the litigation would not have arisen.[9]

In the above examples, permitting a court to exercise specific jurisdiction over the defendant in derogation of the jurisdictional risk the defendant assumed based upon

[8] In this example, the manufacturer's transporting its products through Oregon is not, strictly speaking, a "but for" cause of the Oregon resident's injuries—that is, the products could have arrived through another route. However, the example satisfies the "but for" test as applied by the Ninth Circuit, which held that Carnival's solicitation in Washington was a "but for" cause of the Shutes' injuries, despite that nothing in logic or physical science requires such solicitation as a prerequisite to the Shutes' injuries. *Shute*, 897 F.2d at 383-86.

[9] This example further illustrates the absurd results the Ninth Circuit's "but for" test could compel, inasmuch as, under the test, the Ohio wholesaler could be subject to suit in any of the states through which its machine parts traveled en route to California.

its limited contacts with the forum clearly contravenes " 'traditional notions of fair play and substantial justice.' " *Asahi*, 480 U.S. at 113 (citations omitted). In each example, the defendant is held subject to suit in the plaintiff's chosen forum without any basis from reasonable commercial experience upon which to predict that it could be subject to suit there.[10]

Moreover, permitting a court to exercise jurisdiction in such cases effectively, and impermissibly, absolves the plaintiff of any jurisdictional risk: while maintaining its choice of forum, the plaintiff may, with impunity, choose to do business with a nonresident defendant without inquiring whether the defendant maintains any genuinely-related forum contacts. It is manifestly unfair for a plaintiff to be absolved of all jurisdictional risk where the plaintiff (perhaps after reading an out-of-state newspaper available at its local airport) reaches beyond its own state to conduct business with the defendant, but nonetheless is permitted to hale the defendant into the plaintiff's own courts based upon some incidental contact with the forum that, likely through little more than coincidence, happens to satisfy the Ninth Circuit's expansive "but for" test.

In contradistinction, as this Court has recognized, and as the Ninth Circuit effectively disregards, due process

[10] The Ninth Circuit's application of a "reasonableness" test to the exercise of *in personam* jurisdiction, *Shute*, 897 F.2d at 386, does not effectively ameliorate the unfairness and injustice of the above examples, because, under the Ninth Circuit's test, a rebuttable presumption of "reasonableness" arises when "purposeful availment" of the forum's laws is established. *Id.*

Moreover, even in the absence of a rebuttable presumption of reasonableness, as this case illustrates, such a reasonableness test subsumes the second prong of the specific juridiction standard. Such a reasonableness test, however, lacks sufficient specificity to provide a meaningful constitutional guide. Indeed, in apparent recognition of this point, the Court in *International Shoe* adopted the minimum contacts test as a standard for insuring that the exercise of jurisdiction was reasonable. 326 U.S. at 320. *See also Burnham*, 110 S. Ct. at 2122 & n.7 (Brennan, J., concurring).

considerations of the defendant's forum contacts include consideration of the plaintiff's conduct with respect to the defendant. In *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), where a former wife left the marital domicile and relied upon a state long-arm statute to establish jurisdiction in a child custody suit against her former husband who had remained in the marital domicile, the Court noted that "basic considerations of fairness" pointed against the former wife's assertion of jurisdiction, inasmuch as "[i]t is [the former husband] appellant who has remained in the State of the marital domicile, whereas it is [the former wife] appellee who has moved across the continent." *Id.* at 97 (citing *May v. Anderson*, 345 U.S. 528, 534-35 n.8 (1953)). Similarly, on other occasions the Court has looked to the "minimal interests on the part of the plaintiff," *Asahi*, 480 U.S. at 115, and the "defendant's relationship with the plaintiff," *Keeton*, 465 U.S. at 780, in considering due process limitations on long-arm jurisdiction. Thus, the Ninth Circuit's "but for" test, through permitting an exercise of jurisdiction far in excess of the jurisdictional risk the defendant assumed in its dealings with the forum, and concomitantly with the plaintiff, violates due process standards of fair play and substantial justice.

D. The Ninth Circuit's Decision Contravenes Due Process Limitations on State Power that Ensure Orderly Administration of the Laws

Due process limitations on the exercise of *in personam* jurisdiction "have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority." *Burnham*, 110 S. Ct. at 2110. Following adoption of the fourteenth amendment, a court's exercise of jurisdiction was considered "restricted by the territorial limits of the State in which it [was] established," *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878), and thereby the fourteenth amendment provided " 'for the protection and enforcement of private

rights', including the 'well-established principles of public law respecting the jurisdiction of an independent State over persons and property.' " *Burnham*, 110 S. Ct. at 2110 (quoting *Pennoyer*, 95 U.S. at 733, 722). Such strict territorial limits on a court's jurisdiction, however, gave way in *International Shoe* to jurisdiction based upon "minimum contacts" and " 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (citations omitted). Nonetheless, this Court has recognized that the concept of "fair play and substantial justice" is the "classic expression of the criterion" announced in *Pennoyer* (*Burnham*, 110 S. Ct. at 2110), and that minimum contacts act as a "substitute for physical presence." *Id.* at 2115.

In establishing minimum contacts in part as a surrogate for physical presence, *International Shoe* and its progeny continue to recognize the fourteenth amendment's restriction on state power. Thus, the Court has stated that the fourteenth amendment's "restriction on state sovereign power . . . however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause" and not a function of "federalism concerns." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982). *See also Burger King*, 471 U.S. at 472 n.13. Accordingly, the fourteenth amendment envisions that, through protecting individual liberty interests, due process restricts state power of the forum state, in turn protecting the powers of other states, *cf. World-Wide Volkswagen*, 444 U.S. at 293-94, and, thereby, ensuring the "fair and orderly administration of the laws." *International Shoe*, 326 U.S. at 319; *see also Asahi*, 480 U.S. at 113 (considering the interstate judicial systems interest in obtaining the most efficient resolution of the controversy).[11]

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[11] This due process restriction on state power stemming from protection of individual liberty interests is distinguishable from

The Ninth Circuit's decision, however, fails properly to protect a defendant's individual liberty interests, and, therefore, the decision contravenes these important due process limitations on state power. The liberty interests that the due process clause protects emanate from two sources: the due process clause itself and the laws of the states. *Hewitt v. Helms*, 459 U.S. 460, 466, 470-71 (1983) (citing *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976)). Since *International Shoe*, it has been recognized that the due process clause itself protects a defendant's liberty interest in not being haled before a court and being subject to binding judgments in a distant jurisdiction where no minimum contacts are maintained. *International Shoe*, 326 U.S. at 319; *Burger King*, 471 U.S. at 471-72. As established in part I-C, *supra*, the Ninth Circuit's "but for" test deprives a defendant of this liberty interest and thereby fails properly to limit state power through permitting exercise of jurisdiction with respect to a cause of action that bears no relationship to a defendant's activities in the forum.

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federalism concerns that limit state power in areas other than jurisdiction, inasmuch as a defendant may waive due process protections to liberty interests—through, for example, assuming the jurisdictional risk of the litigation—whereas limitations on state power stemming from federalism cannot be waived by an individual. *Insurance Corp. of Ireland*, 456 U.S. at 702-03 n.10.

The fact that such due process protections to liberty interests may be waived, however, does not mitigate the jurisdictional importance of the resulting due process limitations on state power. As discussed below, many of the protected liberty interests implicated by specific jurisdiction arise by force of the state law of a non-forum state, for example, the defendant's home state. Thus, although afforded by sovereign acts of the defendant's home state, these liberty interests may be waived by the defendant both within and without its home state, and, accordingly, there is no affront to the home state's sovereignty if the defendant effects a waiver outside the state which it similarly could have effected within the state if the litigation were brought there.

Equally important, however, the Ninth Circuit's "but for" test also deprives a defendant of due process protections of liberty interests arising under state law—for example, those interests arising under the laws of the defendant's home state. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court stated:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Id. at 710-11 (footnote omitted). Accordingly, a constitutionally-protected interest has been found to arise under state law where, by issuing driver's licenses, a state affords the right to drive an automobile on state highways. *Bell v. Burson*, 402 U.S. 535 (1971); *see also Paul*, 424 U.S. at 711 (citing *Bell*).[12] Similarly, a liberty interest has been found to arise by virtue of rights afforded under state regulations regarding the conditions of criminal confinement, although no independent liberty interest arose under the Constitution. *Hewitt*, 459 U.S. at 469; *see also Wolff v. McDonnell*, 418 U.S. 539, 556-57

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[12] Although the Court in *Bell* does not expressly identify whether the interest derived from a state's issuing driver's licenses is a liberty or property interest, or both, the Court does state that, once issued, continued possession of a driver's license "may become essential in the pursuit of a livelihood," *Bell*, 402 U.S. at 539, which this Court has recognized as a federal liberty interest. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Moreover, both the Ninth Circuit in *Schuman v. California*, 584 F.2d 868, 870 (9th Cir. 1978), and the First Circuit in *Raper v. Lucey*, 488 F.2d 748, 751 (1st Cir. 1973), have denominated the right to use a motor vehicle as a federal liberty interest protected under 42 U.S.C. § 1983 (1988).

(1974) (Constitution does not guarantee good-time credits while in prison, but state had created a liberty interest in such good-time credits).

The Ninth Circuit's decision, by subjecting a defendant to suits in a distant and unrelated forum, deprives a defendant of important liberty interests afforded by its home state.[13] These state-granted liberty interests, although varying from state to state, may include the right to access to the state's courts for fundamental matters such as those affecting the family, the right to a trial by a jury of the defendant's peers residing in the state, or, in some instances even a trial before an elected judge. *Cf. Burnham*, 110 S. Ct. at 2125 and n.12 (Brennan, J., concurring) (protection of a state's laws and the right to access to its courts, although protected by the privileges and immunities clause, need not be ignored for purposes of determining the fairness of transient jurisdiction); *International Shoe*, 326 U.S. at 320 (defendant "received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights").[14] Additionally, such state-granted liberty interests may include the protection of a unique statute of limitations, or other similar procedural guarantees. *Cf. Keeton*, 465 U.S. at 778 & n.10. Although this Court has never expressly recognized these state-granted liberty interests, such interests should no less rise to the level of a constitutionally-protected interest than the interest in obtaining a driver's license recognized in *Bell*.

[13] Pursuant to the previous analysis, individual liberty interests implicated by due process may arise by force of the laws of a non-forum state (other than the defendant's home state) with which the defendant maintains genuinely-related forum contacts.

[14] The Court in *Boddie v. Connecticut*, 401 U.S. 371 (1970), addressed the right to access to state courts although the case did not involve a liberty interest afforded by state law, but, rather, involved the failure of a state's laws to provide the indigent free access to its courts to obtain a divorce. Thus, the Court in *Boddie* addressed not whether a liberty interest arose under state law but whether denial of access to the state's courts violated procedural due process. *Id.* at 380.

Thus, the Ninth Circuit's disregard of these liberty interests, arising under both the due process clause itself and under state law, violates the fourteenth amendment and, therefore, contravenes important limitations on state power. These limitations on state power act not only to prevent overreaching by the forum state, but, in turn, to protect the power of non-forum states—a balance necessary for the just administration of the law.

E. The Ninth Circuit's Jurisdictional Test Will Harm Small Businesses

A guiding force in this Court's enunciation of the modern law of *in personam* jurisdiction has been the need to adapt the law to the contemporary marketplace. *World-Wide Volkswagen*, 444 U.S. at 293-94; *Hanson*, 357 U.S. at 250-51. The Ninth Circuit's ruling, through disregarding the locus of the exchange of goods and services, fails to account for the realities of the contemporary marketplace and will have substantial detrimental impact on small businesses and the persons they employ.

A small business that has no reasonable basis upon which to gauge its jurisdictional risk must therefore protect against all conceivable risks—risks that grow exponentially as the ability to circumscribe advertising to a local jurisdiction fast vanishes. The Chamber's inquiry among its small business members revealed that the cost of protecting against these risks will be prohibitive for many small businesses.

The costs the Ninth Circuit's decision imposes on small businesses include substantially increased insurance costs to protect against suits in foreign jurisdictions arising from foreign law. If the Ninth Circuit's ruling is upheld by this Court, small businesses may be the next casualties of the national insurance crisis. Small busi-

nesses will have to bear the direct costs—which for them will be exorbitant—of implementing compliance with unique and unfamiliar laws in foreign jurisdictions with which they have only the most minimal of contacts.[15]

Additionally, the Ninth Circuit's ruling requires small businesses to bear alone the substantial cost of defending a suit in a distant forum. Such a result is both inequitable and economically inefficient in that it is the tort plaintiff who is best able to bear the cost of suing in a distant forum because the plaintiff more likely will be able to retain legal services on a contingency basis there.

Finally, the detrimental impact of the Ninth Circuit's ruling on small businesses contravenes long-standing national policy to "protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise." 15 U.S.C. § 631(a) (1988). It is small businesses that are the source of economic innovation and renewal that is the life-blood of the American economy. Indeed, according to the Chamber's statistics, the United States has nineteen million small businesses that employ six out of every ten workers, create sixty-four percent of new jobs, and provide two out of every three workers their first job. Small businesses similarly account for twenty-one percent of the total United States manufacturing output, and account for more than twelve percent of the value of United States goods exported directly by manufacturers. The Ninth Circuit's jurisdictional test poses a definite and serious threat to the continued health of this national resource.

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[15] Although applicable choice of law provisions could reduce this cost, a small business nonetheless must protect against possible application of a foreign forum's law because choice of law provisions generally favor the forum state's law. Twitchell, *supra* note 6, at 664 (citing Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. Davis L. Rev. 869, 871 & nn.14-15 (1981)).

II. THE COURT SHOULD ADOPT A TEST FOR THE SECOND PRONG OF THE SPECIFIC JURISDICTION STANDARD THAT REFLECTS THE FUNDAMENTAL EXCHANGE OF OBLIGATIONS AND BENEFITS BETWEEN THE DEFENDANT AND THE FORUM THAT UNDERLIES SPECIFIC JURISDICTION

In referring to the second prong of the specific jurisdiction standard, the Court in *Helicopteros Nacionales de Colombia, S.A., v. Hall*, expressly declined to address, as not properly before the Court, the appropriate test for applying the second prong of the specific jurisdiction standard. The Court stated:

> Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

466 U.S. at 415-16 n.10. Last term, however, the Court variously referred to the second prong of the specific jurisdiction standard as a "litigation-relatedness requirement," *Burnham*, 110 S. Ct. at 2116, 2114, suggesting a recognition of the difficulties in adopting a purely formalistic test focusing on the logical relationships implicated by the phrases "arising out of" or "related to." Indeed, as the Ninth Circuit's "but for" test reveals, it is in establishing the interrelatedness of human occurrences that logical constructs are perhaps least well suited. As

the Court noted in *Kulko v. Superior Court*, the determination of jurisdiction "is not susceptible of mechanical application" and "is one in which few answers will be written 'in black and white. The grays are dominant and even among them the shades are innumerable.'" 463 U.S. at 92; *see also Burger King*, 471 U.S. at 478 ("[t]he Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests").

In view of the difficulties in adopting a formalistic approach to applying the second prong of the specific jurisdiction standard, the Court, in adopting an appropriate test, should look to the fundamental exchange of benefits and obligations between the defendant and the forum that provides the basis for specific jurisdiction. *See supra* part I-B. This underlying basis for specific jurisdiction necessarily includes consideration of the jurisdictional risk the defendant assumed, due process limitations on state power that ensure orderly administration of the laws, and the need to adopt the law to the contemporary marketplace.

An appropriate test for applying the second prong of the specific jurisdiction standard for determining when "the litigation results from alleged injuries that 'arise out of or relate to'" a defendant's "purposefully direct[ing] his activities [at] the forum," *Burger King*, 471 U.S. at 472, is: whether the defendant, through his activities, may be deemed to have assumed the risk of the litigation in the forum. *See generally Shaffer*, 433 U.S. at 218 (through its contacts with the forum a defendant "knowingly assume[s] some risk" that the forum will exercise jurisdiction). The test is objective and, thus, looks not merely to a defendant's actual consent to jurisdiction, *see Insurance Corp. of Ireland*, 456 U.S. at 704-05 ("[t]he actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not"), but, rather, looks to whether, through its activities, a similarly situated defendant reasonably would have anticipated the risks of litigation in the forum. *See generally World-Wide Volkswagen*, 444 U.S. at 297. Such a test should consider the role of the plaintiff in the forum-related activities in order to protect against the untenable result wherein a plaintiff, perhaps after viewing an advertisement on a retransmitted cable broadcast, reaches outside its forum to the defendant but nonetheless is absolved of any jurisdictional risk.

Unlike the Ninth Circuit's "but for" test, the above test uniquely compliments the fundamental jurisdictional principles underlying the second prong of the specific jurisdiction standard. Most importantly, it clearly maintains the line between general and specific jurisdiction through maintaining the essential role of the exchange of benefits and obligations between a defendant and the forum and remains consonant with the locus of the exchange of goods and services. Thus, where a defendant has been afforded a benefit by the forum with respect to certain activities, the defendant reasonably is charged with assuming the risk of litigation regarding those activities. *International Shoe*, 310 U.S. at 319.

This test comports with due process standards of fair play and substantial justice in that it cannot be deemed fundamentally unfair to charge a defendant with the responsibility for the very risks of distant litigation it knowingly or constructively assumed through its contacts with the forum. Similarly, the test also preserves appropriate limitations on state power, and, concomitantly, the orderly administration of the laws, inasmuch as a defendant is deprived of only those individual liberty interests (whether they emanate from the due process clause itself or state law) which the defendant knowingly or constructively waived through its assumption of the risk of the litigation. Finally, the test adapts to the changing contemporary marketplace because it permits businesses, particularly small businesses, to protect against known or knowable risks, and obviates the necessity, as under the

Ninth Circuit's "but for" test, to assume the substantial cost of protecting against all conceivable risks. *See supra* part I-E.

The very facets of such a jurisdictional risk test that ensure its efficacy, however, preclude the Court's applying the test to this case in its present procedural posture. Because the test is not formalistic and is consonant with the greys and their innumerable shades attaching to the determination of jurisdiction, *Kulko*, 436 U.S. at 92, fundamental fairness requires that the parties be afforded the opportunity to present to the trial court those facts that bear upon Carnival's assumption of the risk of the litigation in Washington. Although the parties have presented evidence regarding Carnival's purposefully directed activities at Washington, the character of that evidence, and the responses thereto, presented by both parties very well may differ with respect to Carnival's assumption of the risk of the litigation through those activities. Accordingly, this Court's decisions recognize that both parties should be afforded an opportunity to present such evidence before the trial court regarding whether an exercise of jurisdiction over Carnival satisfies the above test. *See generally Pinter v. Dahl*, 486 U.S. 622, 639-41 (1988).

CONCLUSION

For the reasons stated above, the Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit and remand for further proceedings.

Respectfully submitted,

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November 15, 1990

(7)

No. 89-1647

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF THE INTERNATIONAL COMMITTEE OF PASSENGER LINES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE INTERNATIONAL COMMITTEE OF PASSENGER LINES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The International Committee of Passenger Lines ("International Committee") respectfully submits this brief as Amicus Curiae in support of Petitioner Carnival Cruise Lines, Inc., regarding the question of the enforceability of the forum selection clause in the Petitioner's cruise ticket contract. The Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was granted on October 1, 1990. Counsel for Petitioner and Respondent have each consented to leave for the filing of this Amicus Curiae Brief. Copies of letters confirming the consent have been filed with the Clerk.

I

INTEREST OF THE AMICUS CURIAE

The International Committee is a domestic, non-profit association of sixteen passenger cruise lines owning and operating more than eighty vessels which call at various domestic and foreign ports. The passenger cruise industry has dramatically increased in popularity over the past ten years, and represents a substantial proportion of vacation time and expenditure by U.S. citizens. Cruise vessels routinely call at numerous ports (domestic and foreign) and attract passengers from varying domiciles throughout the United States. Frequently, U.S. citizens travel by airplane from their residences to an embarkation port in the United States and visit numerous foreign ports on the cruise ship before returning to a United States port and their domiciles.

Each of the member cruise lines of the International Committee issues passenger ticket contracts which designate a forum for resolving legal disputes arising from the contract of passage. The legal question of the enforceability of the forum selection clause in the Petitioner's ticket contract in this case is therefore important to each member cruise line of the International Committee and the cruise line industry in general.

II

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below holds that a forum selection clause in a passenger cruise ticket is unenforceable on grounds of public policy because of the perceived disparity in bargaining power between the passenger and the cruise line. This directly conflicts with the decision of the Third Circuit in *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione,* 858 F.2d 905 (3d Cir. 1988), *cert. dismissed,* ___ U.S. ___, 109 S.Ct. 1633 (1989), and is contrary to the prima facie validity accorded such clauses by this Court in *M/S BREMEN v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972) (*"The Bremen"*). In refusing to enforce the forum selection clause because the terms and conditions of the ticket were not freely bargained for, the Ninth Circuit erroneously relied on

state law, rather than federal admiralty law. A passenger's ticket contract for an ocean cruise is maritime and therefore is governed by federal maritime law, which is intended to be uniform throughout the nation.

Each cruise line represented by this Amicus includes a forum selection clause in its passenger ticket contract. These forum clauses serve legitimate purposes for both the passenger and cruise line. They benefit the passenger by providing certainty and predictability in matters of personal jurisdiction and venue, and eliminate the burdens of global litigation for a cruise line.

The inclusion of a forum clause in a standard, pre-printed form passenger ticket does not itself evidence oppressive or overreaching conduct by a cruise line. In the absence of an unlawful purpose, fraud or overreaching, a passenger ticket contract which effectively communicates the importance of a forum clause should be enforced by the courts.

III

ARGUMENT

A. A Forum Selection Clause in a Passenger Ticket Contract Is Prima Facie Valid.

A passenger cruise ticket for an ocean voyage is a maritime contract, and disputes arising under it are governed by the substantive law of admiralty. *See The Moses Taylor,* 71 U.S. (4 Wall.) 411, 427 (1867); *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959), *rehearing denied,* 359 U.S. 962 (1959). The nature of maritime commerce requires that the substantive rights and responsibilities of shipowners and passengers be uniform throughout the United States. *See The Lottawanna,* 88 U.S. (21 Wall.) 558 (1875); *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917); *Romero v. International Terminal Operating Co.,* 358 U.S. 354; *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 401-402 (1970). The need for national uniformity of the substantive maritime law is particularly compelling in the case of cruise lines whose vessels, on any given voyage,

may call at several ports in domestic and foreign commerce, and embark passengers from many diverse domiciles.

The cruise line members of the International Committee issue pre-printed ticket contracts to passengers. Each of those ticket contracts includes a forum selection clause. Petitioner's ticket contract specifies Florida, its principal place of business, as the forum for adjudicating disputes with passengers.

A forum selection clause in a passenger ticket serves legitimate purposes. The forum clause provides a passenger with advance notice where suit can properly be brought against the cruise line. Since the forum selection clause is tantamount to a confession of personal jurisdiction, it eliminates any such question. *See National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 315-316 (1964). In addition, a forum clause removes the potential of global litigation for the cruise line. *See The Bremen,* 407 U.S. at 13-14. Enforcement of a ticket clause designating a forum which is not the personal residence of a passenger undeniably results in some inconvenience to a passenger-litigant. In the absence of an enforceable forum clause, however, cruise line passengers from widely differing domiciles throughout the United States would have discretion to bring suit wherever personal jurisdiction could be obtained, or where the accident giving rise to the suit occurred. The resulting uncertainty of venue and jurisdiction frequently provokes pre-trial motions for change of venue or to dismiss on grounds of *forum non conveniens.*[1]

Ticket contracts containing conditions and limitations have been used by cruise lines for over a century. Whether such limitations are contractually binding on the passenger has been the subject of litigation for almost as long. This Court first considered that question in *The Majestic,* 166 U.S. 375 (1897), and declined to enforce a limitation of liability clause only because it was not properly incorporated into the contract. Later, in *New York Central & Hudson River Railroad Co. v. Beaham,*

[1] As noted by Justice Kennedy's concurring opinion in *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22, 33 (1988), the federal judiciary has a strong interest in eliminating the time and expense involved in such potentially wasteful motions.

242 U.S. 148 (1916), this Court held that a similar limitation of liability clause was enforceable because it was properly incorporated into the ticket contract.

The decision below invalidates the Petitioner's forum selection clause for reasons of public policy, citing the absence of evidence that the passenger had the opportunity to bargain over the terms of the ticket contract. This Amicus does not dispute the underlying assumption that a passenger rarely engages in actual bargaining for a particular forum clause in the ticket contract. Indeed, present day travel and commercial reality render such bargaining impractical, if not impossible. The courts, however, have enforced these forum selection clauses even though the underlying contract is in a pre-printed form. *See Shankles v. Costa Armatori, S.P.A.,* 722 F.2d 861 (1st Cir. 1983).

The federal courts, when called upon to decide whether a limiting provision in a ticket is contractually binding on the passenger, have consistently utilized the "reasonable communicativeness" test first adopted by the Second Circuit in *Silvestri v. Italia Societa Per Azione Di Navigazione,* 388 F.2d 11 (2d Cir. 1968). In that case, Judge Friendly noted that the common thread running through the cases upholding such limiting provisions was the fact that the shipowner had done all that it reasonably could to warn the passengers that the conditions were important and affected their legal rights. When the terms and conditions of the ticket have been "reasonably communicated" in this fashion, they are binding on the passenger. The First, Second, Third, Fifth and Sixth Circuits have all adopted this "reasonable communicativeness" test. *See,* e.g., *Muratore v. M/S SCOTIA PRINCE,* 845 F.2d 347 (1st Cir. 1988); *Silvestri,* 388 F.2d 11; *Marek v. Marpan Two, Inc.,* 817 F.2d 242 (3d Cir.), *cert. denied,* 484 U.S. 852 (1987); *Carpenter v. Klosters Rederi A/S,* 604 F.2d 11 (5th Cir. 1979); *Barbachym v. Costa Line, Inc.,* 713 F.2d 216 (6th Cir. 1983).[2]

[2] The reasonable communicativeness test has also been applied by the Ninth Circuit in upholding the enforceability of limiting conditions in pre-printed airline ticket contracts. *See Deiro v. American Airlines, Inc.,* 816 F.2d 1360 (9th Cir. 1987).

As the reasonable communicativeness test has developed, some courts have confined their analysis to the physical characteristics of the ticket itself, considering the type size of the forum or other limiting clause, and whether it has sufficient prominence to be deemed incorporated within the contract. *See,* e.g., *Barbachym,* 713 F.2d 216. Other courts have, in addition, focused on extrinsic factors surrounding the purchase and review of the ticket, inquiring whether the passenger had an opportunity to become knowledgeable of the contract's limitations. *See,* e.g., *Shankles,* 722 F.2d 861. Under this latter, two-pronged test, the courts have held that a limiting clause is binding on a passenger even if the contract was not read, provided the passenger had an opportunity for such review. *See DeNicola v. Cunard Line, Ltd.,* 642 F.2d 5 (5th Cir. 1981).[3]

The Ninth Circuit's decision in the case below ignores this long history of enforcing limiting provisions in maritime ticket contracts when those provisions have been reasonably communicated to the passenger. Instead, the court—erroneously, this Amicus submits—looked to state law to determine that because the forum selection clause in the pre-printed ticket contract was not negotiated, it was unenforceable. *See* Appendix to Petition for Writ of Certiorari at 23a. While the individual states may have varying views as to the enforceability of contract forum selection clauses

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[3] The reasonable communicativeness test has been specifically used as a benchmark for testing the validity of one-year time limitations for suit provisions in passenger ticket contracts. Section 183b, Title 46 U.S.C., which prohibits time bar suit limitations of less than one year, was enacted to prevent cruise lines from imposing unreasonably short periods of time on passengers. *See Catterson v. Paquet Cruises,* 513 F. Supp. 645 (S.D.N.Y. 1981); *Barrette v. Home Lines, Inc.,* 168 F. Supp. 141 (S.D.N.Y. 1955). Noncompliance with a one-year suit clause requires dismissal of the action unless the particular ticket fails to give reasonable notice of the limiting condition. *Catterson,* 513 F. Supp. 645. Amicus submits that the one-year suit provision authorized by § 183b should be viewed as tacit approval by Congress of the imposition of reasonable limitations in passenger cruise contracts, irrespective of the fact that these ticket contracts are in a pre-printed form. Cf. *Cannon v. University of Chicago,* 441 U.S. 677, 696-97 (1979).

within their own borders, the nature of maritime commerce requires that the rights and responsibilities of shipowners and their passengers not vary according to the passengers' domicile and the jurisdictions in which the vessels operate. The Ninth Circuit's reliance on state law in declaring the forum clause unenforceable violates the constitutional principle that the maritime law should apply uniformly throughout the nation. *See The Lottawanna,* 88 U.S. (21 Wall.) 558; *Southern Pacific Co. v. Jensen,* 244 U.S. 205.

The prima facie enforceability of limiting provisions in maritime contracts was most recently confirmed by this Court in *The Bremen,* 407 U.S. 1. That case involved a maritime contract, between two commercial entities, which included a London forum selection clause. This Court held that the admiralty law should give effect to such forum selection clauses, and that they are considered prima facie enforceable even if contained in contracts that are not the product of negotiation. *See* 407 U.S. at 9-10.

B. A Forum Selection Clause Should Be Enforced Absent Specific Evidence of Fraud or Overreaching or that Enforcement Would Unreasonably Deny the Passenger a Day in Court.

In *The Bremen,* 407 U.S. 1, this Court held that a forum selection clause in a maritime contract should control, absent a strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid because it was inserted in the contract by fraud or overreaching. *Id.* at 15. Despite the fact that a contract may be adhesive, the party resisting enforcement should bear a heavy burden of proof. It is not sufficient for the plaintiff resisting enforcement to merely show that the balance of convenience strongly favors his chosen (non-contractual) forum. Instead, this Court held that " . . . it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18.

The most recent comprehensive discussion of forum selection clauses in cruise line passenger contracts is found in *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione,* 858 F.2d 905. There, the Third Circuit relied upon this Court's decision in *The Bremen* and upheld a forum clause in a passenger's ticket requiring a New York citizen to bring suit in Italy. The Third Circuit applied the "reasonable communicativeness" test in evaluating the physical characteristics of the ticket and acknowledged that the forum clause was properly incorporated in the contract. The court then went on to rule that, despite the pre-printed form of the passenger's contract, the forum clause was enforceable under the rule of *The Bremen*. The court was persuaded that the cruise line did not make *unfair* use of its admitted superior bargaining power over the passenger, even though the specific terms of the contract were not negotiated. *See* 858 F.2d at 913, citing *Restatement (Second) of Conflict of Laws*, § 80 (1971).

The Ninth Circuit's decision below acknowledges that *The Bremen* rule is controlling, but erroneously disregards it on public policy grounds because the ticket contract was not freely negotiated. This is contrary to the rule of *The Bremen* which specifically accorded presumptive validity to forum selection clauses, and directly conflicts with the Third Circuit's opinion in *Hodes,* 858 F.2d 905, which expressly extends *The Bremen* presumption of enforceability to passenger cruise contracts.

Rather than enforce the contractually agreed upon forum, the Ninth Circuit in this case weighed and balanced the relative conveniences of the parties to suit in the chosen forum and the contract forum. That approach transformed a legal question of contract enforcement into a *forum non conveniens* issue, an analysis expressly rejected in *The Bremen. See* 407 U.S. at 8-12.

This Amicus respectfully submits that this Court should confirm the rationale of *Hodes* and extend the rule of *The Bremen* to passenger cruise contracts, properly governed by the federal maritime law. The principle articulated in *The Bremen* and followed in *Hodes* is not so mechanical or rigid that a party cannot avoid enforcement of the clause where it would truly deprive that party of the opportunity to present a case. In *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir.), *cert.*

denied, 474 U.S. 948 (1985), for example, the court refused to enforce a presumptively valid forum selection clause in a contract designating Iran as the chosen forum. Instead, the court concluded that the post-revolutionary conditions in Iran, including the cessation of diplomatic relations between the United States and Iran, the state of war between Iran and its neighbor Iraq and the suspension of all commercial air flights to Iran, clearly made it gravely dangerous, if not impossible, to litigate in Iran. Under those circumstances, the court held that enforcement of the forum clause would have deprived the plaintiff of its day in court. Thus, under *the Bremen* test, a passenger has the opportunity to establish why the clause should not be enforced. The fact that compelling circumstances may exist in an unusual case to justify the refusal to enforce a forum clause, however, should not be allowed to dictate the rule generally applicable.

A forum selection clause in a passenger cruise ticket that is reasonably communicative, not inserted as a result of fraud or overreaching, and which does not effectively preclude a litigant from pursuing a claim, should be enforced. Recognition of the presumptive enforceability of forum selection clauses will promote certainty and predictability for the parties in resolving their disputes.

IV

CONCLUSION

The International Committee of Passenger Lines urges the Court to reverse the decision of the Court of Appeals on the ground that it fails to accord proper respect under the federal maritime law to the presumptive enforceability of a reasonable forum selection clause in a passenger cruise contract.

Respectfully submitted,

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